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REPORTS OF CASES

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JANUARY TERM, 1874.

VOLUME LI.

By HENRY JACKSON, REPORTER.

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OF THE
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HON. R. P. TRIPPE, JUDGE*Forsyth*.

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Western Circuit.....*HON. GEORGE D. RICE*.....*Gainesville*.

*Judge HARRIS was appointed to succeed Judge SESSIONS, whose term of office had expired. He qualified on January 24th, 1872.

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NOTE.

By Act of 1866, (section 4270 of the Code) the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Judges McCAY and TRIPPE, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head-notes being made by the Reporter. All other head-notes by the Reporter are designated by (R.)

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA,

JANUARY TERM, 1874.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.

H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

FRANCIS G. WILKINS *et al.*, plaintiffs in error, *vs.* HENRY L. BENNING *et al.*, defendants in error.

1. The ordinary has no authority to purchase land for the benefit of the county, sold for non-payment of the state and county taxes.
2. Where an ordinary purchases for the county, land sold for the non-payment of the state and county taxes, at a sum far below its actual value, pays for it out of the county funds, holds it until reimbursed the sum thus paid out, and then conveys it to the county treasurer for an amount far less than its value, who purchases with a knowledge of all of the facts aforesaid, equity will decree a conveyance of said property to purchasers at a sale thereof, under an execution against the former owner, based on a judgment obtained subsequent to the aforesaid tax sale.
3. The ordinary has no authority to pay the city taxes, on property purchased as aforesaid, out of the county funds.

County matters. Ordinary. Taxes. Equity. Judgment.
Before Judge JAMES JOHNSON. Muscogee Superior Court.
May Term, 1873.

Wilkins *et al.* vs. Benning *et al.*

For the facts of this case, see the decision.

PEABODY & BRANNON, for plaintiffs in error.

HENRY L. BENNING, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant to compel him, for the causes alleged therein, to execute a deed of conveyance to them for city lot number one hundred and ninety-six, in the city of Columbus, and deliver possession thereof, and for such other relief as might seem equitable and just. On the trial of the case, the defendant demurred to the complainants' bill, which was overruled by the court. The case was then tried, and the jury, under the charge of the court, found a verdict in favor of the complainants. The case comes before us on the exceptions made in the record to the charge of the court to the jury, and refusing to charge as requested, and in overruling the demurrer to complainants' bill.

The facts of the case, as disclosed by the evidence in the record, are substantially as follows: On the 7th day of September, 1869, the city lot was sold by the sheriff of Muscogee county, by virtue of a *fieri facias* issued by the tax collector of said county against James F. Winter, for his state and county tax, amounting to the sum of \$127 50, and was purchased by Duer, the ordinary of said county, for the sum of \$143 00, the sheriff making him a deed to the lot as ordinary. The purchase money was paid by Duer, ordinary, out of the county funds by allowing the sheriff a credit in his settlement with the county for taxes collected under tax sales. The written agreement, signed by Duer and Benning, shows that Duer, as ordinary, purchased the lot for the county to secure the payment of the tax due by Winter, and that he held the title to the lot, as ordinary, for that purpose, and his books show that he opened an account with Winter and the county of Muscogee, and charged Winter \$149 55, the amount of the tax *fi. fa.* and costs of advertising, etc., and credited

Wilkins *et al. vs. Benning et al.*

him with \$500 00, for rent received, but does not state that this amount was received for the rent of lot one hundred and ninety-six; but the evidence in the record is, that the rent of the lot was worth \$300 00 per annum. Duer, as ordinary, charges Winter, in his account, with the city taxes, which he alleges he paid for him to the city, and thereby seeks to reduce the amount of rent received by him for the lot which he held for the county as ordinary. An execution in favor of Brockett and others against Winter, issued on a judgment obtained in June, 1870, was levied on lot one hundred and ninety-six, as the property of Winter, 4th of March, 1871, and sold by the sheriff in May, 1871, and purchased by the complainants for the sum of \$1,400 00, the sheriff making to them a deed to the lot. On the 21st of December, 1871, Duer, as ordinary of Muscogee county, conveyed, by deed, to Wilkins all the right, title, interest, claim or demand which he, as ordinary aforesaid, had in and to lot one hundred and ninety-six, without warranty, for the consideration of \$350 00. Wilkins was the county treasurer, and had notice of all the material facts before recited when he purchased the lot, which the evidence shows was worth \$3,000 00, and the annual rent thereof, \$300 00. Duer, the ordinary, had possession and control of the lot, under his pretended purchase, for two years and three months before he sold it to Wilkins. There was no error in overruling the demurrer to the complainants' bill.

This case presents the extraordinary spectacle, at least in the courts of this state, of two public officers combining together to appropriate to their own use a valuable city lot worth \$3,000 00, under *color* of legal authority to do so. The theory of the defendant's case, as presented by the argument, is that Duer, as ordinary for the county, had the legal right to purchase the property at the sale, pay for it out of the county funds, and hold the property in trust for the county until the taxes due should be paid, and that the title to the lot being made to the ordinary, it vested in the county, and that Wilkins acquired a good title by his purchase of it from Duer, the ordinary of the county. The reply is that the

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ordinary had no authority, under the law, to make the purchase of the lot for the benefit of the county, or to make sale of it as the property of the county in the manner as set forth in the record. Assuming, however, that the ordinary originally intended to act in good faith, and that he purchased the property in his official capacity to secure the payment of the taxes due to the county, and for the benefit of the county, though without any authority of law to do so, why did he, after holding the property long enough for the rents thereof to pay the amount of tax due the state and county, convey the title to the lot to Wilkins? There was certainly no good reason why he should have done so to protect the interest of the *county* in the lot. It is true he attempts to reduce the amount of rent received, by crediting himself, as ordinary, with the amount of city taxes paid by him out of the county funds, but he was not the officer for the city, he was an officer for the county, and as such officer had no authority to pay taxes due the city out of the county funds. The jury, however, have found by their verdict that he had received a sufficient amount from the rent of the property to pay the county and state taxes due thereon, and, in our judgment, the evidence in the record is sufficient to sustain their verdict as to that point in the case. The conveyance of the title to the lot by Duer, the ordinary, to Wilkins, the county treasurer, who had knowledge of the facts, was *merely colorable*, and too transparent to deceive anybody as to its real object and purpose. The whole transaction was without authority of law, and contrary to public policy, and cannot receive the sanction of this court. All public offices in this state are created for the benefit of the people thereof as an organized community and not for the benefit of any particular individual person or persons; and whenever a public officer, in the discharge of the duties imposed on him by law seeks, under *color of his office*, to make private gain for himself or family beyond his compensation as prescribed by law, he and all persons acting in complicity with him for that purpose, deserve and should receive

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the stern condemnation, not only of the courts of the country but of all good men.

In view of the facts disclosed by the record, we find no material errors in the charge of the court to the jury, or in the refusal to charge as requested, and if there had been some technical errors in the charge, still the verdict is right, and we would not have disturbed it for that reason.

Let the judgment of the court below be affirmed.

**MARTHA E. B. MOYE, plaintiff in error, vs. ELAM B. WATERS,
defendant in error.**

1. Although a husband purchases property with money belonging to his wife, the presumption is that the property belongs to the husband, until the contrary is shown.
2. Where the husband transfers to his creditor a promissory note before its maturity, which belongs to and is payable to his wife, or bearer, and the wife sues the creditor in trover for the note—it was not error for the court to refuse to charge the jury, a written request of plaintiff—that the transfer did not divest the title of the note. The request should have contained the qualification that the jury should believe from the evidence that defendant had notice that the note was the property of the wife.
3. Where there is no error in what the court did charge, or in the refusal to charge the special requests made, and there is no motion for a new trial, this court will not grant a new trial on the ground that the court below failed to charge on certain points which the losing party claims were favorable to him, although under the evidence such further charge would have been proper.

Husband and wife. Presumption. Promissory notes. New trial. Practice in the Supreme Court. Before Judge JAMES JOHNSON. Taylor Superior Court. October Term, 1873.

Martha E. B. Moye brought trover against Elam B. Waters for a note dated March 1st, 1872, due on the 1st of the succeeding June, for \$500 00, made by Colbert & Montfort, payable to the plaintiff. In a second count the note is de-

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scribed as payable to the defendant. The general issue was pleaded. The evidence made, in brief, this case :

Plaintiff's husband, with money belonging to her separate estate, purchased a stock of goods in the town of Butler. He subsequently sold out to Colbert & Montfort for \$2,000 00, receiving \$500 00 in cash, and three notes each for \$500 00. These notes were made payable to the plaintiff, or bearer. At the time of this sale her said husband was indebted to the defendant \$965 00, \$375 00 of which amount was for goods sold on commission. He delivered to the plaintiff the \$500 00 in cash, and the aforesaid three notes received for said stock. The defendant demanded from him the payment of the aforesaid indebtedness, and threatened him with a prosecution for larceny after trust should he fail to comply. Thoroughly alarmed under this threat, he gave to the defendant an order on Colbert & Montfort for \$465 00, and, without the knowledge or consent of the plaintiff, abstracted from the drawer of her bureau one of the aforesaid notes, which he offered to the defendant. The latter refused to receive it on account of its being made payable to the plaintiff, but stated that if the makers would sign a new note, payable to him, it would be satisfactory. This course was pursued and the indebtedness settled. The order and note were both paid. Plaintiff's husband used her money, originally, in the purchase of said stock of goods against her protest, and he sold out under her earnest solicitation.

The defendant swore positively that he did not know that the note delivered to him was the property of the plaintiff.

The court charged the jury, amongst other things, as follows:

"A married woman, who has money in her own right, in her possession, and the husband takes the possession of it and uses it, the presumption of the law is that he used it by her consent, and if the husband purchases property with such money, the law presumes that the property thus purchased is the property of the husband until the contrary is shown by proof."

"If the wife permit her husband to use her money, though

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it be her separate estate, without contract, express or implied, to be responsible to her for it, the husband does not, by such use, thereby become a debtor to his wife for the money so used." To which charges the plaintiff excepted.

The plaintiff requested the court to charge as follows: "If the plaintiff did not consent for her husband to take her money, but opposed his taking it, and he did take it and purchased the goods with it, then the goods purchased with the money were the property of the plaintiff. If Moye was indebted to the plaintiff, by reason of having taken her money without her consent, and being so indebted, did, in good faith, deliver to her, in payment of such indebtedness, the note in controversy, then the right and title to such note vested in the plaintiff, and if Moye, without her consent, took said note and delivered it to the defendant, such delivery did not divest her title to it."

The court refused thus to charge, and plaintiff excepted.

The jury found for the defendant. Error is assigned upon each of the aforesaid exceptions.

E. H. WORRILL; B. B. HINTON, for plaintiff in error.

J. M. MATTHEWS; W. S. WALLACE, for defendant.

TRIPPE, Judge.

1. The mere fact that property is purchased by one and paid for with the money of another, does not vest the title to such property as against third persons in the one whose money paid for it. Nor does any legal or equitable right spring out of such a fact in favor of such person, against innocent purchasers, who, in good faith, take the title from one who is apparently the true owner and in truth is so, except as to some secret equity of the party whose money has been used. There must be notice of such an equity before it can avoid a title otherwise good. In *Shewmate vs. Ballard*, 1 Metcalf's Reports, (Kentucky,) a husband sold a slave belonging to his wife, and received therefor a bill of sale to himself for another slave. It was held that the legal title to the latter vested in

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the husband, and a purchaser from him, without notice of the wife's equity, was protected against it. And the court in pronouncing, say: "We are aware of no principle or authority upon which a latent equity, thus derived, can be allowed to prevail, even in favor of a married woman, against a party who has fairly acquired the legal title and whose purchase has invested him with an equity at least equal to that relied upon." See, also, 16 Alabama, 486; 5 B. Monroe, 233; *Bryan & Hunter vs. King*, decided at this term.

2. Hence, if a husband uses the money of his wife, with or without her consent, and acquires thereby the title in himself to other property, third persons who *bona fide* take title for value from him to such property, will be protected. The charge of the court, which is excepted to, was, therefore, not such as the plaintiff could complain of. It really did not affect the controlling point in the case. That point is whether, when the defendant took the note from Mr. Moye, he had notice of the title or equity of Mrs. Moye to it, so as to charge him with *mala fides*, and thereby vitiate his title. Granting that the note was, in fact, the property of Mrs. Moye; that her husband did, with her money, with or without her consent, purchase the stock of goods; that he was her debtor to the amount of her money he had used, and that he discharged the debt to her by delivery of this note, with others; and grant, further, that he took the note without her knowledge, and paid it to the defendant for what he owed him, how does that affect the case as it is made in the record? There is not a word of testimony that anybody knew, until this suit was brought, that the husband had bought the goods with her money, and hence nothing arises in her favor against the defendant on that ground. But suppose the note was legally the property of the wife. It was payable to her or bearer; it was not due; it was delivered to the defendant for a valuable consideration; and the question is not, was the note ever the property of the wife, but did such a note, thus transferred, become the property of defendant? It thus rested on the good faith of the defendant, or rather, as expressed by the

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court in *Matthews vs. Poythress*, 4 *Georgia*, 287, it depended on whether his title was defeated by his *mala fides* in the purchase, and that was to be determined by his notice or want of notice that the note was not the property of the husband. That question was not presented in the requested charge made by plaintiff, and which was refused by the court and excepted to. The request was made as a whole. The first branch of it, to-wit: that, under the recited facts, the goods became the property of the plaintiff, might be true as between her and her husband, and yet not affect the case. The latter branch could not have been properly given without the qualification, that the jury should believe from the evidence that defendant had notice that the note was the property of the wife. The *bona fide* purchaser of a negotiable note, before it is due, from one who has no title, acquires a title: 4 *Georgia*, 287; 8 *Georgia*, 421. The test in such cases is *bona fides*—notice. We are not considering the question, whether the jury found right or not, under the evidence—whether there was anything in the facts of the case to charge defendant with actual or constructive notice—whether the mere fact that the note was payable to the wife or bearer, was sufficient. The husband, when that note was refused, afterwards brought another, payable to defendant, which was accepted. How a jury should have considered such testimony, we do not say. That matter is not before us.

3. There was no motion for a new trial. No request was made for a charge on this point. As it was the controlling one, the charges the court did give contained nothing which damaged the plaintiff. She was not entitled to the rejected charge, in the form requested, and we cannot set aside a verdict and grant a new trial merely because a party complains of an omission to charge on certain points which he thinks were favorable to him. A request founded on those should have been made of the court, and its attention called to them.

Judgment affirmed.

Johnson vs. Lovelace.

**JOEL T. JOHNSON, plaintiff in error, vs. JOHN H. LOVELACE,
defendant in error.**

1. Where the question at issue was, whether the conveyance of a tract of land by a father who was in insolvent circumstances, to his son, for an alleged consideration, was made for the purpose of hindering and delaying his creditors, the possession by the father after the alleged sale was a badge of fraud.
2. If the deed was made for the purpose aforesaid, and it was taken by the son knowing such intent, then it was void as to the creditors of the father.
3. The ability of the son to pay the purchase money for the land, before and at the time of the purchase, was a material circumstance for the consideration of the jury.

Debtor and creditor. Fraud. Evidence. Before Judge JAMES JOHNSON. Harris Superior Court. October Term, 1873.

For the facts of this case, see the decision.

JAMES M. MOBLEY, by brief; R. A. RUSSELL, by JAMES M. RUSSELL, for plaintiff in error.

INGRAM & CRAWFORD; E. H. WORRILL; L. L. STANFORD, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury found the land levied on subject to the plaintiff's execution. The case comes before us on exceptions to the charge of the court to the jury, and to the admission of evidence at the trial over claimant's objection. There was no motion made for a new trial in the court below. It appears from the evidence in the record that Isaac Johnson, the defendant in execution, was in insolvent circumstances, unable to pay all his debts; that in May, 1866, he conveyed the land in controversy, by deed, to his son Joel T. Johnson, the claimant, for \$5,000 00, which the claimant was to pay to the creditors of Isaac Johnson, as he directed and preferred, Isaac Johnson, the defendant in execution, remaining in possession of the property conveyed. It

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also appears from the evidence in the record, that after the conveyance of the land to the claimant he said that his father had told him that Lovelace (whose execution was levied on the land) should not be paid anything on his debt because Lovelace had been the first to sue him.

1. The claimant insists that he purchased the land in good faith for the sum of \$5,000 00, and that he has paid that amount to the creditors of his father as he agreed to do, and endeavored to establish the fact by his own evidence at the trial, which was not controverted, though there is one significant fact in the statement of the claimant in specifying the particular claims and the amount thereof which he had paid, and that is, whilst he was not bound to pay but \$5,000 00 for the land, yet he did in fact pay \$5,412 65 for it, \$412 65 more than he agreed to pay. Did he, in his anxiety to show that it was a fair, *bona fide* transaction between him and his father, over-act his part? Did he over-do the matter in attempting to prove the payment of the \$5,000 00?

2. The fact that the father remained in possession of the land after his conveyance of it to his son, was a badge of fraud. The fact that the claimant said that his father had told him that Lovelace should not be paid anything on his debt, shows pretty clearly that it was his intention to delay and hinder the payment of the debt of that creditor, and that the claimant knew of that intention of his father. The court charged the jury, in substance, that if the deed to Joel Johnson, the claimant, was made by Isaac Johnson to hinder and delay creditors, and it was taken by Joel Johnson, knowing that intent, then it was void as to the creditors of Isaac Johnson. We find no errors in any portion of the charge of the court to the jury, in view of the evidence contained in the record, but think the questions involved were fairly submitted to the jury for their consideration by the charge of the court.

3. There was no error in allowing the claimant, who was a witness, to be asked what he was worth before the war, and at the time he bought the land, and what he was worth now.

Bransford & Crawford.

His ability to pay the purchase money for the land before and at the time of the purchase, was a material circumstance for the consideration of the jury, and there was no legal objection to his stating what he was then worth, in view of the facts of the case.

Let the judgment of the court below be affirmed.

**WILLIAM D. BRANSFORD, administrator, plaintiff in error, vs.
MARTHA A. CRAWFORD, defendant in error.**

1. The grand-child of an intestate, whose father died before the grandfather, takes an interest in the estate of the intestate, subject to the advancements made to the father of such grand-child.
2. The declaration of such intestate, that certain notes which he held on his son, were not held by him as debts against his son, but as advancements to him, are admissible in evidence in an action by the grand-child for her share in the grand-father's estate.

Administrators and executors. Distribution. Advancement. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

Martha A. Crawford, one of the heirs-at-law of John Bransford, deceased, cited William D. Bransford, the administrator upon his estate, to appear before the ordinary for a settlement. Judgment was rendered in favor of the petitioner for \$800 00, whereupon the defendant appealed.

Upon the trial in the Superior Court, the petitioner showed that she was the only child of James A. Bransford, who was the son of the intestate, John Bransford; that her father, James A. Bransford, died before the intestate; that \$800 00 was a distributive share of said estate.

The defendant introduced in evidence two notes given by James A. Bransford to Mary Bransford, one for \$250 00, dated February 11th, 1860, the other for \$335 00, dated March 10th, 1864. He then proved that Mary Bransford, the payee, was, at the dates of said notes, the wife of John

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Bransford, the intestate ; that she never had any separate estate ; that she was in the habit of keeping the money of her husband, who would refer all applicants therefor to her ; that she died some time prior to her husband, and that he found the above notes among the papers of the intestate after his death.

The defendant then offered to prove by his own oath that his intestate had said to him and others that he did not hold said notes as debts against said James A. Bransford, but as advancements to him. Upon objection, this testimony was excluded, and defendant excepted. The jury found for the petitioner \$800 00. Error is assigned upon the aforesaid exception.

WILLIS & WILLIS, for plaintiff in error.

E. H. WORRILL, for defendant.

TRIPPE, Judge.

1. In the distribution of an estate, every child of the intestate, and if a child be dead, the representative of that distributive share, must first account for any and all advancements made in intestate's lifetime : Code, section 2582; 23 *Georgia*, 351.

2. As to the other question made in the record, whether the declarations of the intestate are admissible in evidence as to how he held the notes on his son, to-wit: as advancements and not as debts, we think the case of *West et al., executors, vs. Bolton*, 23 *Georgia*, 351, determines it. It was there held that just such declarations made by the father-in-law were admissible against the children of his son-in-law, in a suit by them against the executors for their share in their grandfather's estate. Strong decisions were read on the argument of this case to the contrary of this rule: *Kreider vs. Boyer*, 10 *Watts*, 54; *Haverstock vs. Sarbach*, 1 *Watts & Sergeant*, 390; 4 *Wheat.*, 130. But this court, in *West vs. Bolton, supra*, seems to have considered these decisions and to have deliber-

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ately held the declarations to be admissible. It is true, in that case the declarations were solemnly made by the testator, at the time of the execution of his will and afterwards. When first made, the notes were lying before him, so there was no question as to his meaning and as to the identity of the notes. How far the testimony may go in this case to satisfy the jury we cannot say. Whether the notes can be satisfactorily identified as the ones the intestate referred to and sufficient explanation given of their terms, (to-wit: the party to whom they were made payable) is a matter for the jury. These and the manner and circumstances under which the declarations may have been made are to be left to them. In the case in 23 *Georgia* it is stated in the opinion, as reported, that certain cases in the Connecticut reports seem to favor the admission of such declarations: Clark and others *vs.* Warner *et al.*, 6 Connecticut 355, and Johnson *vs.* Belden *et al.*, 20 *Ibid.*, 322, are cited. We rest this decision on the one rendered in 23 *Georgia*. As to section 2580, Code, prescribing that a certain act on the part of a parent "shall be evidence of the fact of an advancement," it may be remarked that it cannot, of course, be claimed that it was intended to declare that to be the only way in which it could be proved. A gift made with the intent of its being an advancement, and so accepted, may be proved to be such, though there be no writing either by the parent or child. Let the evidence go to the jury, for their consideration, under the directions to be given them by the court.

Judgment reversed.

DAVID K. WALKER, plaintiff in error, *vs.* PETER WALKER
et al., defendants in error.

The discretion of the chancellor granting an injunction to restrain the defendant from disturbing the complainants in the possession of a farm which they claimed to have rented from him, will not be interfered with where the defendant is shown to be insolvent.

Walker vs. Walker et al.

Injunction. Trespass. Before Judge HALL. Upson County. At Chambers. January 24th, 1874.

Peter Walker and Marlin Brown filed their bill against David K. Walker, making this case: They had been tenants of defendant during the year 1873, and were due him twenty-one bales of cotton for rent. This had not been paid because it had been held up under process of garnishment, served upon the complainants at the instance of creditors of the defendant. They had rented the same farm from him, known as the Grant place, for the year 1874. Defendant had nevertheless sought to remove them as tenants holding over, but they had stopped such proceeding by making a counter-affidavit and giving bond as required by law. He had also levied a distress warrant for the aforesaid rent on twenty-five bales of cotton and four hundred bushels of corn, which they have met as prescribed by law. He now denies that he ever rented to them the aforesaid place for the year 1874, and is interfering with the rights and privileges of complainants by menaces, threats, etc. He has driven away the hands of complainants, has locked up some of their houses, and is using every endeavor to drive them off of the place. If he is permitted to proceed in his lawless course by keeping the hands of complainants from the field, he will subject them to irreparable loss and damage. He is totally insolvent. Pray the writ of injunction.

The defendant showed for cause that the complainants had a complete remedy at law; admits that they were his tenants during the year 1873, but denies any contract for the year 1874.

The bill and answer were respectively sustained by numerous and conflicting affidavits.

The chancellor ordered the injunction to issue upon complainants' giving bond and security, conditioned to pay to defendant whatever amount of rent might be recovered against them, provided the issue on the proceeding against them as tenants holding over should be determined in his favor. To this judgment defendant excepted.

Dennis and wife vs. Weekes.

POE, HALL & LOFTON, for plaintiff in error.

E. G. SIMMONS; PEEPLES & HOWELL, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant, praying for an injunction to restrain him from disturbing them in the possession of certain rented premises, which the complainants allege they had rented from the defendant for the year 1874, upon the allegations contained therein, the complainants alleging that the defendant was insolvent. On the hearing of the motion for the injunction before the presiding judge, a number of affidavits were read on each side, which were conflicting as to the merits of the application, and are contained in the record before us. The judge granted the injunction prayed for, and the defendant excepted.

In looking through the various affidavits in the case, and considering the *insolvency* of the defendant, we will not interfere with the discretion of the presiding judge in granting the injunction in this case.

Let the judgment of the court below be affirmed.

WILLIAM T. DENNIS AND WIFE, plaintiffs in error, vs. WILLIAM J. WEEKES, defendant in error.

1. A witness may give his opinion of the sanity of a testator, if he state the facts on which that opinion is founded.
2. Under this rule, the opinion of the witness Peek, as to the condition of testator's mind when he last saw him, was admissible, for he gives the facts on which he rests that opinion. The same may be said of the opinion expressed by caveatrix in her testimony.
3. But this does not entitle the witness to give an opinion "that testator was in a condition to be easily influenced," or "that he seemed to be under the influence of W. altogether," or to state, "he cannot say what the full influence of W. was, although he (the testator) seemed to be obedient to the commands of W." The witness should give the facts on which these statements were based.

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4. The remark made by caveatrix in her testimony: "I did not know that W. was the first, and probably by far the largest legatee in, the will," was not admissible to prove that W. was such a legatee, but it was competent for her to give it as a reason, and for what it was worth, as such, why she had changed her purpose, as indicated by former declarations of hers, not to contest the will.
5. On the trial of an issue of *devisavit vel non*, the admission of an executor before qualification is admissible to impeach the will, when such admission is in reference to the conduct or acts of the executor as to some matter relevant to the issue.
6. Parol evidence of the declarations of a testator, expressing dissatisfaction with his will, and made shortly after its execution, such as "I have done something I ought not to have done; I have made my will, and did not make it as I wanted to; I know I did wrong, but I could not help it. Lord God Almighty, who ever heard of such a will, but I can't change it," is admissible, not to prove the fact that fraud was practiced upon him, or that undue influence was actually exercised, but as tending to show the state of testator's mind, and that he was in a condition to be easily influenced.
7. There having been illegal testimony admitted upon the point of undue influence, and the verdict setting aside the will having been rendered by the jury especially upon that ground, and a new trial having been granted by the judge who tried the case, we think it proper that all the issues presented in the case should be submitted to another investigation.

Wills. Witness. Opinions. Evidence. Admissions. Administrators and executors. Declarations. New trial. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

Virginia Dennis, wife of William T. Dennis, petitioned the Court of Ordinary of Talbot county, setting forth that she was the daughter of William Stallings, deceased; that William J. Weekes produced before said court, in December, 1869, an instrument in writing purporting to be the last will and testament of said Stallings, which paper was admitted to record in common form; that said Weekes claims to be the executor under said instrument, and has taken possession of the estate. Prays that an order may issue requiring said Weekes to probate the same in solemn form.

Upon the usual proceedings being had to bring all the par-

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ties at interest before the court, Virginia Dennis and her husband filed the following caveat:

1st. That the paper propounded for probate by William J. Weekes, as the last will of William Stallings, is not his will, because when he signed said paper he was incompetent, from insanity and mental imbecility, to make a will.

2d. That he did not make said paper as his last will freely and voluntarily, but made the same in consequence of the undue influence and constraint which the said Weekes exercised over him.

3d. That the said Weekes did, by fraud and deceit, and fraudulent and false representations, procure the said Stallings to make said will.

4th. That the said Weekes used fraudulent practices upon the fears, affections and sympathies of the said Stallings, and thereby procured him to sign said paper as his will.

The case was carried to the Superior Court by appeal. Upon the trial there had, the evidence was voluminous, and as every question of law made is presented in the motion for a new trial, it is deemed best not to encumber the case with so much useless matter.

The jury returned the following verdict :

"We, the jury, find the paper exhibited to us not to be the will of William Stallings through undue influence."

The propounder moved for a new trial upon the following grounds, to-wit :

1st. Because the court erred in admitting the following testimony of William Peek : "From the facts stated, in his opinion, William Stallings was beyond question an insane man." "The last time he saw Stallings, his mind was lost and insane ; Stallings was in a condition to be easily influenced the last time he saw him." "When he last saw Stallings, he seemed to be under the influence of Weekes altogether ; he cannot say what the precise extent of Weekes' influence was, though he seemed to be obedient to the commands of Weekes."

2d. Because the court erred in admitting the following testimony of the caveatrix, Virginia Dennis : "My father was a

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person of unsound mind. I did not know that Mr. Weekes was the first and probably by far the largest legatee in the will." "Weekes said that if that will was broken, they might carry him to the gallows the day after it was done." "Mr. Weekes told me he had my father to make the will in order to protect my father's estate from a third party, Nancy Stallings' illegitimate child."

3d. Because the court erred in admitting the following testimony of Ellen Hill: "At the supper table he sat down and did not eat anything. I said to him, 'Mass Billy, why don't you eat?' He said, 'I have done something this evening I ought not to have done; I have made my will, and did not make it as I wanted to.'" "Mr. Persons came over to see Mr. Stallings. He asked Mr. Persons what was in the will? When told, he said, 'Lord God Almighty, who ever heard of such a will, but I can't change it. I know I did wrong; I could not help it.' I heard him tell Mr. Persons to get it and to tear it up."

4th. Because the verdict is contrary to evidence, law and the charge of the court.

The verdict was set aside and a new trial ordered; whereupon caveatrix and her husband excepted.

HENRY L. BENNING; WILLIS & WILLIS; W. B. HILL,
for plaintiffs in error.

E. H. WORRILL; M. H. BLANDFORD, for defendant.

TRIPPE, Judge.

1. It was not denied in the argument that a witness may give his opinion of the sanity of a testator, and indeed on any other question to be decided by the jury, and which is one of opinion, provided he gives his reasons therefor: Code, section 3867.

2. Under this rule, a portion of the testimony of the witness Peek, which was objected to, was admissible, and part not. He states how the testator appeared and acted, the last time

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he saw him; describes his manners and conversation, and then gives "his opinion from the facts stated." Mrs. Dennis (the caveatrix) is still more full and explicit in stating the facts on which her opinion of the insanity of her father is founded.

3. But when the former witness (Peek) says "he was in a condition to be easily influenced," he is giving a conclusion of his mind growing out of the opinion he had already expressed, and does not offer any facts illustrating the matter of his being easily influenced. This statement of the witness bears upon the issue made of undue influence. Insanity and unsoundness of mind, is one thing, undue influence quite another. So, when the same witness says that the testator "seemed to be altogether under the influence of Weekes, he cannot say what the full extent of Weekes' influence over Stallings was, though Stallings seemed to be obedient to the command of Weekes," he should have given the facts on which these statements were based. He recites none; no act of Weekes showing power or control; no yielding on the part of Stallings to a command or even wish of Weekes, exhibiting submissiveness. It is a general statement of how matters "seemed," as to the relation between the parties he was referring to, without a single act or fact illustrating it, or furnishing a foundation for his impression. He does say he negotiated with Weekes, who professed to be acting as the agent of Stallings, for the purchase of a plantation belonging to testator, but sets forth nothing in the negotiation or otherwise, manifesting power or control on the part of Weekes, or the "obedience" of Stallings to him.

4. Another exception to the testimony was, the admission of the remark made by Mrs. Dennis, that "she did not know that Weekes was the first and probably by far the largest legatee in the will." Although this may not have been competent to prove that the executor was such a legatee as described by the witness, yet, it was admissible in another view and for another purpose. Mrs. Dennis was the caveatrix. She had just admitted that under certain information given her by the executor, as to disposition of the property by the will, she had

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once told him "if that was true, she was satisfied." It was also in proof by a witness for the propounder, that she had, just after the death of her father, "expressed herself as satisfied," meaning with the will. It is true, this went in after her testimony was objected to, and admitted. But in passing on the competency of testimony courts will look at the whole record. The witness, then, by her own admission (without considering the subsequent testimony on that point) stood as one contesting that with which she had on a former occasion said she was satisfied. It was competent for the propounder to prove she had so said. Unexplained, it would have put upon her the burden of having taken two conflicting positions, at one time approving the will, and now contesting it in court. She should have been allowed to explain this, and to have given her reason to be considered for what it was worth, as such, why she had changed her former purpose. Moreover, it was claimed on the trial by her that the executor was, in fact, a large beneficiary under the will, and evidence on that point, *pro* and *con* submitted. It was a material question, strongly urged, and strongly denied. It rested largely on facts outside of the will. The *caveatrix* did not at the time she refers to, (when the admission was made,) know how the property was disposed of by the will, except from what the executor told her. Such, at least, is the import of her testimony. She certainly had the right for the purpose of explanation, to give the reason she did for the change in her intention as to *caveating* the will. The whole of it amounts to about this. She admits she at one time was satisfied, and so said, but that was because she was mistaken and was misled by the executor. She has since changed her purpose because the executor is "probably the largest legatee in the will." She sets up that fact as one point also in the attack on the will. If the remark she made which is objected to, cannot establish that fact, it can at least go for what it may be worth, as explanatory of her own action, which action of hers, was set up against her by the propounder on the trial.

5. The next objection was to the admission of the testimony

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of Mrs. Dennis, that Weekes, the executor and propounder, had said to her "that he had my father, the testator, to make the will to protect his estate from the illegitimate child of Nancy Stallings, idiot daughter of testator." The ground on which this objection was put in the argument was, that the admissions of an executor are not competent evidence on the issues made, unless he is also a legatee, or took a benefit under the will, and that there was no evidence that either was true in this case. The cases cited by counsel for defendant in error, who was the movant for a new trial in the court below, and which was granted, do all seem to rest the admissibility of such testimony on the ground that the executor and propounder was also a legatee: 12 *Georgia*, 75; 14 *Ibid.*, 308; and also in this same case, (for it has been here before;) 46 *Ibid.*, 514. Without impeaching this rule, and in strict compliance with it, were not the admissions of this executor properly given to the jury. As has been already stated, the caveatrix claimed that he was a large beneficiary by the will, and introduced testimony to prove it. Counsel for Weekes stated, in his brief, that "whether Weekes took anything under the will depended on the fact whether he was indebted to Stallings at the time the will was written." This is unquestionably true. Counsel further says, which is also true, "to prove that he was a legatee, caveatrix undertook to show that Weekes was indebted to Stallings." And after citing the testimony on this point, to-wit: the amount of notes he held belonging to Stallings, the crops that went into his hands, the interest he made, and then what he accounted for, says: "This evidence would show a considerable deficit;" that is, would show a considerable indebtedness on the part of Weekes. And so it would. This was the *status* of the testimony when the admissions of Weekes were proven. Were they not properly admissible under the rule, as it is claimed to be by the movant for the new trial? But it is said that Weekes accounted, in his testimony, for all this, and showed that instead of his being indebted to the estate, it was really indebted to him. Granting that he did testify to all this, the

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evidence objected to was already in and properly in. The fact that Weekes claimed that by his testimony he had explained what had been testified to against him, and had relieved himself from it, did not affect the competency of evidence already before the jury. The court could not have anticipated the explanation and rejected the admissions, nor could it, after Weekes had testified, have pronounced that it was satisfactory to show he was not a beneficiary under the will, and then have withdrawn the admissions. A recovery cannot be had on a note which is on its face barred by the statute of limitations, unless a promise to pay it in writing, or a written acknowledgment, is proved, or a credit thereon entered by the maker, or signed by him. Suppose, in a suit on such a note, the plaintiff tendered the necessary acknowledgment in writing, and proves by a witness that he knows the defendant's handwriting, and believes the paper tendered is his writing. It is at once admitted. The defendant may swear that he did not write the paper, and introduce witnesses who say it is not in his handwriting. The court could not, on that testimony, withdraw the paper or non-suit the plaintiff. The case, with all the testimony, would be submitted to the jury. Section 2437, Code, says: "On the investigation of an issue of *devisavit vel non*, the admission of an executor, before qualification, or of a legatee, (unless the sole legatee,) shall not be admissible in evidence to impeach the will, except the admission be in reference to the conduct or acts of the executor or legatee himself as to some matter relevant to the issue." Does this mean that if the admission be in reference to the conduct or acts of the executor himself as to some matter relevant to the issue, it is admissible, independent of the fact whether or not he is a legatee or takes a benefit under the will? But outside of such a construction of this provision of the Code, and for the reasons given, the testimony was properly admitted and a new trial should not have been granted on that ground.

6. Another ground taken in the motion for a new trial was that the court erred in admitting the testimony of the witness, Ellen Hill, proving certain declarations of the testator. These

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were made the night after the execution of the will in the afternoon and the ensuing morning. These declarations, as proved, were, "I have done something I ought not to have done; I have made my will and did not make it as I wanted to; I know I did wrong, but I could not help it; Lord God Almighty, who ever heard of such a will? but I can't change it," with other strong expressions, one of which was telling a friend to "get the will and tear it up." The witness stated that some of these exclamations were made that night at the supper table. That he would not eat; that he walked the floor nearly all night, saying, "I have done wrong; I have done wrong; I am a ruined man." Was not this proof admissible? The grounds of caveat were mental incapacity, and fraud and undue influence on the part of the executor. These sayings of the testator do not refer to the executor or to any thing that he had done, nor does he (testator) complain of his fraud or influence of any sort, or that of any one else. He does not complain of any wrong having been done him. But if they were not admissible to prove the fact that fraud had been practiced upon the testator, or that undue influence was actually exercised, they tended to show the state of his mind and that he was in a condition to be easily influenced. Any evidence throwing light upon that point was competent. The question of the soundness of mind of the testator, his sanity, on that day, was in issue. Witnesses on both sides had testified on the point, some affirmatively, others denying his unsoundness. His firmness of mind and strength of will had also been referred to in the testimony. Would not this evidence, if accepted and credited, tend, with some force, to illustrate the issue? Would they not look somewhat like the ravings of a crazy man, who thought he was helpless? Taking into consideration the time when these declarations were made and all the facts connected with them, as detailed by the witness, they were admissible as exhibiting the condition of testator's mind and that it was such that he might easily have been influenced to do what he did not approve of. With this view, it is unnecessary to review the authorities referred to in

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the argument. As stated by Judge LUMPKIN, in *Williamson vs. Nabers*, 14 Georgia, 308, "the principle asserted in them applies to declarations as to the intentions of the testator or to proof of fraud or some such matter and does not conflict with our decision on this point." He had previously said "such evidence (the declarations of a testator) is proper to assail such capacity (testamentary) or to afford presumption of undue influence." There was then no error in admitting the testimony complained of in this ground and the new trial should not have been granted for that cause.

7. The judgment of the court below granting the new trial does not give the ground upon which it was placed. This court has often held that it is less inclined to interfere with the action of the judges of the superior courts where a new trial is granted, than when it is refused. They are specially authorized to grant new trials when any material evidence has been illegally admitted against the demand of the applicant: Code, section 3714. We have said we think a portion of the testimony of the witness Peek was illegal. It was upon the point of the influence of the executor over the testator. The verdict setting aside the will recites that it was rendered on that ground. The judge who tried the case thought there should be a new investigation, and if there be anything that can reasonably sustain a judgment granting a new trial, this court will not say that the judge who so pronounces abused his discretion. It is better that all the issues presented in the case be submitted to another jury.

Judgment affirmed.

GEORGE PATTERSON, plaintiff in error, *vs.* F. PHINIZY & COMPANY, defendants in error.

1. The only legal discretion which the Superior Court has to set aside a verdict because it is contrary to the testimony, is in a case where the verdict is decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding.

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2. In an action for a tort, the question of damages being one for the jury, the court should not interfere with the verdict, unless the damages are either so small or so excessive, as to justify the inference of gross mistake or undue bias.

New trial. Damages. Before Judge GIBSON. Richmond Superior Court. April Term, 1873.

For the facts of this case, see the decision.

McLAWS & GANAHM, for plaintiff in error.

BARNES & CUMMING, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, to recover damages for having an execution under a pretended lien levied on the plaintiff's property without authority of law. On the trial of the case the jury found a verdict in favor of the plaintiff for the sum of \$3,345 00, with interest from 1st of January, 1868. A motion was made for a new trial on the several grounds alleged therein, which was granted by the court, unless the plaintiff would write off from the verdict all over the sum of \$1,410 00, whereupon the plaintiff excepted.

1. The court granted the new trial on the terms stated, (as appears from the record,) because, from its views of the evidence, the verdict was wrong. The court has no discretion, under the law, to set aside the verdict of a jury, because it differs with them as to the credibility of the witnesses sworn on the trial, or as to the effect their testimony, in its opinion, should have upon the minds of the jury. When the court undertakes to do that it invades the exclusive province of the jury. The only legal discretion which the court has to set aside the verdict of a jury, on the ground that it is contrary to the evidence, is in cases where the verdict is decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding.

2. In this case the defendants were sued for a wrongful inju-

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ry done to the plaintiff, and in such cases, the question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias: Code, 2947. From the evidence in the record before us there is nothing to justify the inference of gross mistake, or undue bias on the part of the jury in finding the verdict they did, but on the contrary the evidence, in our judgment, is decidedly in favor of the verdict, and the court erred in setting it aside as set forth in the record. The jury having found a specified amount in favor of the plaintiff for his damages, he was not entitled, under the law, to interest thereon as found by the jury. In view of the facts of this case, as disclosed by the record, we reverse the judgment of the court below granting the new trial, on condition that the plaintiff shall write off from the verdict the interest found by the jury from the 1st of January, 1868, up to the time of trial, and that being done the verdict to stand for the amount of damages found by the jury.

Let the judgment of the court below, granting the new trial, be reversed, with instructions as indicated in this opinion.

SARAH MARGARET BROWN, by next friend, plaintiff in error,
vs. ELIZABETH KIMBROUGH, administrator, *et al.*, defendants in error.

1. A deed was executed in 1861 by an administrator, for land purchased at his sale, reciting that J. B., as trustee for his wife, M. B., was the highest bidder. It then acknowledges the receipt of the purchase money from J. B., trustee for M. B., and conveyed the land to J. B., trustee for M. B., his successors in office and assigns:

Held, that the deed having been made by an administrator to the husband and accepted by him, a separate estate in the wife was thereby created, although there were no special words in the deed to that effect.

2. Such being the legal effect of the deed, a bill filed by the wife against vendees holding under her husband, with notice of the deed, for the purpose of canceling the conveyances executed to them, and charging that the land was paid for by her husband out of her separate estate, is not demurrable.

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Trusts. Husband and wife. Deed. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

Sarah M. Brown, by her next friend, David N. Burkhalter, filed her bill, making the following case:

On November 2d, 1858, her husband, Jack Brown, purchased from William M. Brown, as administrator upon the estate of Joseph T. Shelton, a certain tract of land in the county of Talbot, for the sum of \$13,000 00, and paid for the same with money belonging solely and exclusively to complainant. The deed executed by the administrator was in the usual form. It recited that "Jack Brown, as trustee for his wife, Margaret Brown, being the highest bidder, the same was knocked off to him at the sum of \$13,000 00." It then proceeds, "in consideration of \$13,000 00, in hand paid to said William M., administrator, by said Jack Brown, trustee of Margaret Brown," to convey the said bargained premises to "the said Jack Brown, trustee of Margaret Brown, and his successors in office and assigns." No power of sale was vested by the deed in the trustee. Her said husband has sold various parcels of said land to different purchasers, who bought with full notice of the aforesaid trust, and all of whom were made parties defendant to the bill. These sales were made without the knowledge or consent of complainant. The land is of the yearly value of \$3,000 00.

Prays that her said husband may be removed from the trust and some suitable person appointed in his place; that said purchasers may be decreed to be trustees for complainant as to the parcels of land respectively purchased by them; that she may recover of said purchasers rents and profits, and that the writ of subpoena may issue.

On demurrer, the bill was dismissed, and complainant excepted.

H. L. BENNING; M. H. BLANDFORD, for plaintiff in error.

E. H. WORRILL; WILLIS & WILLIS, for defendants.

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TRIPPE, Judge.

1. By the ancient common law, it was thought to be an infringement upon the marital rights for a stranger to confer property upon a wife, independent of her husband, and over which he could have no control. This was because the husband became liable for his wife's debts, contracted before marriage; was also bound to maintain her and her children, and he was therefore entitled to the enjoyment of her property. It was finally settled, however, that gifts or settlements of this kind could be maintained where it clearly appeared that the intention of the settler was that the wife should have a separate estate: Perry on Trusts, secs. 646, 647. The foundation of the rule requiring that a clear and explicit intention must appear in order to exclude the husband, is the regard the law has for the husband's rights, growing out of his obligations. These rights he could waive or renounce, if he so desired. Tested by this rule, the deed in this case, if it had been made to a third person as trustee for the wife, would not have conferred a separate estate on the wife, and there would have been nothing in it to bar the rights of the husband, and to prevent the title from vesting in him. There are no such words used in the deed (independent of those conveying it to the *husband* as trustee,) as indicate that the land was intended to be for the sole and separate use of the wife: Hill on Trustees, 421; Perry on Trusts., secs. 648, 649.

2. Does the fact that the deed was made to the husband as trustee for his wife, and that he so bid off the land, bar his marital rights and create an estate in the wife? We think it does, upon principle and authority. When a conveyance is made by a stranger to a third person, as trustee for the wife, the husband has no part in the transaction. He is not an actor. He stands on his rights as husband. If, by clear and explicit intention, or by the use of the proper terms, a separate estate is created in the wife, she so takes, and his rights are barred. If this intention is not unequivocal, and as he has done nothing to estop him, his rights attach, and may be

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asserted. But if he is the settler himself—if he executes a conveyance to a *trustee* for his own wife—it is a declaration by himself of his consent that his wife shall take. He passes the title to another for his wife, and that simple act, without any technical or express words to prevent the title from at once revesting in himself, is sufficient to show his consent to waive or part with his rights as husband; else the whole transaction would be but a legal farce. He cannot call upon the law, through its regard for his marital rights, to reassert for him what he has solemnly surrendered. The difference between a deed made by the husband and one by a stranger, although the same terms may be used in both, is manifest, so far as this point is concerned, on the very face of the question. And the strict rule set up for the benefit of the husband, where a third person is the settler, has no reason for its application, when he himself is the actor and executes the conveyance. Accordingly, in *Johnson vs. Hines*, 31 *Georgia*, 720, it was held that a conveyance by the husband directly to the wife will be supported in equity in favor of the wife against her husband's representatives. It is true the property in that case came through the wife, and that fact is referred to by the court; but it was not the reason for the judgment. So in *Steele vs. Steele*, 1 Iredell's Equity Reports, 452, it was ruled that a conveyance by a husband, in trust for his wife, was for her separate use.

The same reasoning and the same principle will apply in cases where the conveyance is to the husband as trustee for his wife, and so are the authorities. In *Darley vs. Darley*, Hardwicke, Lord Chancellor, said, "I am of opinion that where an estate is given to a husband for the wife; he may be considered as a trustee for her separate use;" 3 Atk., 399. And yet the words "for the use of the wife," would not be sufficient to create a separate estate if the deed was to a stranger as trustee: *Wills vs. Sayres*, 4 Mad., 411; *Darcy vs. Croft.*, 9 Iredell's Equity, 19; *Tenant vs. Stoney*, 1 Richard's Equity, 222; *Johns vs. Lockhart*, 3 Bro. Ch., 383, (*n.*); *Hill on Trustees*, 421. *Kensington vs. Dolland*, 2 Mylne & Keene, 184, was

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a case where the husband was joined with another as trustee, and the purposes of the settlement went beyond the interest of the wife. It was held that as there were two trustees, and as the intention to give a separate estate was not clear, the wife did not take a separate use. But in the argument it was distinctly asserted "that where a bequest is made to a husband in trust for his wife, he is a trustee for her separate use." This was not denied, and the only reply to it was, that "it could make no difference, for he (the husband) is associated with the other trustee, and must be taken therefore to be a trustee not for his wife alone, but for all the purposes of the settlement." *Ex parte Beilby*, 1 Glyn & Jam., 167, was cited in support of this reply where the decision was put on the ground that the husband was not the only trustee, but was associated with two others, not for that particular fund, but for all the purposes of the will. The judgment in *Kensington vs. Dolland* seems distinctly to recognize the principle that if the husband had been the sole trustee for his wife, a separate estate would have been created, although there might have been no other words used expressly showing such intent. Perry on Trusts, section 651, states the rule to be, "if the gift is to the husband and another, as trustees for the wife, it will not be to her separate use; but a gift to the husband alone, in trust for his wife, will be to her separate use."

The deed in this case recites that the husband, as trustee for his wife, bid off the land at the administrator's sale, and it is made to him in trust for her. It could have been no matter of interest to the administrator, as such, how the deed was executed. He could not, with strict legal propriety, be called the settler, whose intention should be looked to as the guide in construing the deed. His duty was to sell according to law, to receive the money and execute a deed to the highest bidder. As administrator, he could have had no will, desire or intention, to create a trust or a separate estate, or to do anything else but to convey the fee to the one who bid off the land and paid the money. It would be absurd to look for his intention under the rule that has been stated. There can be

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no doubt but that the husband directed, dictated the conveyance, and the administrator only did as he was instructed, so far as any trust at all was created. This, at least, is the legal inference. To all legal intent and purpose, then, in construing this deed, the husband may be looked upon as both settler and trustee. We have seen if he make a conveyance in trust for his wife, a separate estate is created, although such words may not be used as are necessary when executed by a stranger; and if he is appointed the trustee in the deed, the same rule again applies. It then comes with greater force when the husband may be considered as filling both offices. We are, therefore, of opinion that there was error in sustaining the demurrer and dismissing the bill.

Judgment reversed.

WILLIAM ROGERS, trustee, *et al.*, plaintiffs in error, vs. JOHN CUNNINGHAM, executor, defendant in error.

[McCay, J., was providentially prevented from presiding in this case.]

1. Where a marriage settlement was executed, by which a vested remainder interest in the wife was conveyed to trustees for the purpose of protecting it from the marital rights of her husband, and to secure the same for the benefit of herself and children, should she have any, reserving the right to dispose of the same by will or otherwise, during coverture, if she had no children, and in the event of her failure to make any disposition thereof during life, then to go to her heirs-at-law: *Held*, that upon the death of the husband, without any children by that marriage, leaving the wife surviving, the trust was executed, and that the widow held the property in the same manner as she did before her marriage.
2. Upon the second marriage of the widow, said remainder interest, in the absence of a settlement, vested in her husband by virtue of his marital rights.

Trusts. Husband and wife. Marriage settlement. Before Judge SCHLEY. Chatham Superior Court. May Term, 1873.

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For the facts of this case, see the decision.

JACKSON, LAWTON & BASINGER, for plaintiffs in error.

LOVELL & FALLIGANT; HENRY B. TOMPKINS, for defendant.

WARNER, Chief Justice.

The bill in this cause was filed by John Cunningham, executor of the will of John B. Gallie, against William Rogers, trustee under the marriage settlement of Joseph Carruthers and Jane A., his wife, and against Joseph S. Carruthers, Elizabeth Carruthers, Ella Carruthers, and Janet Carruthers, a minor, returnable to the January term, 1873, of the Superior Court of Chatham county.

The bill alleged in substance as follows: That on December 23, 1815, a marriage-settlement was made and entered into between Joseph Carruthers and Jane A. Stutz, both of said county of Chatham, whereby certain property of said Jane A. was conveyed to trustees therein named for the sole and separate use of the said Jane A., until the marriage, and after the marriage for her sole and separate use during her life, and thereafter for the use, benefit and behoof of any child or children that she, the said Jane A., might have by the said Joseph Carruthers, share and share alike, their heirs and assigns forever; that the said marriage took place, and that the said Joseph Carruthers afterwards died, leaving him surviving his widow, the said Jane A., and three children of said marriage, viz.: the said Joseph S. Carruthers, and James Carruthers and Janet Carruthers, the two latter now deceased; that the said James Carruthers died July 29, 1854, leaving a widow, the said Elizabeth Carruthers, one of the defendants, and two daughters, viz.: the said Ella and Janet, also defendants in the said cause; that the said Janet Carruthers, the daughter of the said Jane A., was married, without a settlement, to John B.

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Gallie, July 5, 1849, and died childless, September 17, 1854, the said Gallie surviving her; that the said Gallie died February 1, 1863, leaving two children of a marriage previous to his marriage with the said Janet, viz.: Mary, now the wife of Robert A. Trippe, and Julia, now the wife of Thomas P. Bond; also a widow, Charlotte M. E., married after the death of the said Janet, and two minor children by the said Charlotte, viz.: Lucy Christina and Charles R. Gallie, and leaving also a will, which was duly admitted to probate and record in said county of Chatham, whereby, after certain specific legacies and bequests, he gave and bequeathed all the remainder of his estate, of every description, of which he was possessed, or might become entitled to, by will, inheritance or otherwise, to his executors named in the said will, and the survivor of them, etc., in trust for the benefit of his said surviving widow and all his children, by that or any other marriage, in a certain manner in the said will set forth; that the complainant, John Cunningham, is the only surviving executor of the said will, and has been duly qualified, and that the defendant, William Rogers, was substituted as trustee under the marriage settlement aforesaid, in lieu of the trustees therein named, who had long previously died, by order of the Superior Court of Chatham county aforesaid, on the 3d day of June, 1863, upon proceedings duly instituted for that purpose; that the said Jane A. Carruthers, the life tenant under the marriage settlement aforesaid, died on the 17th day of July, 1872.

Upon these allegations the complainant claims that Janet, the wife of John B. Gallie, was entitled, at the time of her marriage with him, to a vested estate in remainder in fee in an undivided third of the property conveyed in trust by her mother's marriage settlement, which estate in remainder passed to the said Gallie upon his marriage, and devolved upon his executors at his death as part of the residuum of his estate, for the trusts specified in his will; and that upon the termination of the life-estate of Mrs. Jane A. Carruthers, he was entitled to receive one-third of all that remained of the property

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mentioned in the marriage settlement upon the trusts specified in Gallie's will; and, describing the remaining property, he avers that he has applied to the defendants for a distribution and partition, which the defendants, denying his right, as Gallie's executor, to any part of the property, had refused. And the bill prays that commissioners may be appointed to make a partition, with power to sell, etc., for that purpose, and that one-third of the property may be allotted to him, as executor, as aforesaid, upon the trusts specified in the will.

Answers were duly filed, one by the trustee, the other by the remaining defendant, Mrs. Elizabeth Carruthers having first been appointed guardian *ad litem* of her minor daughter, Janet. The defendant Rogers, the trustee, admits the facts stated in the bill to be true, and submits himself to the decree of the court as to the rights of the parties, praying only to be reimbursed certain monies expended by him for the trust estate.

The other defendants also admit the facts stated to be true, but allege these additional facts, viz: That Janet Carruthers, before her marriage with Gallie, and on October 29th, 1844, was married to one Francis S. Porcher, and on that day, in consideration of the marriage, made and entered into a marriage settlement with him, whereby she conveyed to certain trustees, therein named, "all her estate, right, title, interest, property, claim and demand whatsoever, at law and in equity, being a remainder in fee in a certain proportionate share" of, in and to, the property mentioned in her mother's marriage settlement aforesaid, to have and to hold the said proportionate share, "to commence in possession immediately after the determination of the life-estate of the said Jane A. Carruthers therein," in trust "for the sole and separate use of the said Janet until the marriage, and then for her sole and separate use during her life, not subject to the control, management, debts or liabilities" of Porcher, "and after the death of the said Janet, then in trust for the sole use of such children of the said marriage as should be living at the time of her death; and in case there should be no child or children living as afore-

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said, then to such person or persons as the said Janet should, during her lifetime, (notwithstanding her coverture,) order, devise, limit or appoint; and in case no such order, devise, limitation or appointment should be made, then to the heirs-at-law and next of kin to the said Janet, according to the provisions of the laws of the State of Georgia regulating the distribution of the estates of intestates dying without issue;" that the said Porcher died, leaving no issue of the said marriage; and that the said Janet did not, at any time during her life, order, devise, limit or appoint any person or persons, in any manner whatsoever, to take her said proportionate share of the property after her death. And upon these new facts, the defendants insist that the heirs-at-law and next of kin to the said Janet, at the time of her death, who were entitled to her aforesaid estate in remainder, were her mother and her two brothers, above named ; and that, upon the death of Mrs. Carruthers, the said Joseph S. became entitled to one-half of the said property in fee, and the said Elizabeth and her two daughters to one-third thereof in fee as tenants in common, and the said two daughters to one-sixth thereof in fee as tenants in common ; and that Gallie acquired no interest at all in any of the said property by his marriage with his wife, Janet. And the defendants, with this denial of any right in Gallie's executor to participate, concur in the prayer for a partition, but only among themselves.

The new facts thus stated by these defendants were admitted by the complainant, and there being thus no question of fact involved, the cause came on to be heard before the judge alone, upon the bill, answers and exhibits attached to both, during the May term of the said court, in the year 1873 ; and thereupon, the judge decided that the marriage settlement with Porcher was not a conveyance of Janet Carruthers' estate in remainder to the trustees named, but only a contract for a future settlement ; that her title did not, therefore, pass by that settlement, but remained in her, and became vested in Gallie upon his marriage with her ; that, even if that were not so, Gallie became entitled, as her heir-at-law, upon her

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death, by the terms of the Porcher settlement; and that the complainant, as his executor, became, therefore, entitled to one-third of the property upon the death of Mrs. Carruthers, for the purpose of Galiie's will, and directed a decree to be prepared accordingly.

To the whole and every part of this decision the defendants excepted.

1. Under the marriage settlement of Jane A. Stutz and Joseph Carruthers, dated 23d December, 1815, Janet Carruthers, one of the children and issue of that marriage, became entitled to one-third of the real estate of her mother in remainder, to be enjoyed in possession after her mother's death, she having a life-estate therein. In other words, Janet had a vested remainder in one-third of the real estate embraced in that marriage settlement, to be enjoyed in possession after the death of her mother, Jane A. Carruthers. Jane A. Carruthers, the tenant for life, did not die until July, 1872. On the 29th of October, 1844, Janet Carruthers intermarried with Porcher, and executed a marriage settlement by which her property was vested in trustees, for the purpose of protecting it from the marital rights of her husband, and to secure the same for the benefit of herself and children, if she should have any, reserving the right to dispose of the same by will or otherwise, during coverture, if she had no children, and failing to make any disposition of it during her life, then it was to go to her heirs-at-law. The sole object and intention of that marriage settlement was to protect her property against the marital rights of Porcher, her intended husband, and to secure the same for the benefit of herself during her coverture, and for the benefit of her children after her death, if she had any, and if she died without children, her husband surviving her, he was to have no part of her property, but the same was to go to her heirs-at-law in the same manner as it would have done if she had died intestate before her marriage with Porcher.

2. But Porcher died first, and there were no children, and she held her property in her own right just as she held it be-

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fore her intermarriage with Porcher. There was nothing for the trustees to do; all the objects and purposes for which the trust was created, ceased and determined on the death of Porcher, the husband, without children by the marriage. There was no longer any necessity for trustees to protect her property after the death of Porcher than there would have been for trustees to protect her property before her intermarriage with him, and if she had died intestate after the death of Porcher, and before her intermarriage with Gallie, her next of kin would have taken her property in the same manner as they would have done if she had died intestate before her intermarriage with Porcher. If Mrs. Porcher had died intestate before her intermarriage with Gallie, her next of kin, her blood relations, would have inherited her property, not under the marriage settlement with Porcher, her former husband, but under the statute laws of the state. If she had made such a marriage settlement with Gallie as she made with Porcher, and had disposed of her property by will in her lifetime, then she could have secured her property for the benefit of her blood relations after her death, but she did not do so; and upon her intermarriage with Gallie his marital rights attached thereto. The title to one-third of the property under her mother's marriage settlement, was in her as a vested remainder, and upon her intermarriage with Gallie, as the law then stood, her real estate belonging to her became vested in and passed to him as her husband, by virtue of his marital rights as such husband: *Prescott & Pace vs. Jones & Peavy*, 29 *Georgia Reports*, 58; *Shipp et al. vs. Wingfield*, 46 *Ibid.*, 593. The result, therefore, is that the title to the property was in Gallie at the time of his death, subject to be enjoyed in possession at the termination of the life-estate of Jane A. Carruthers, and the executor of Gallie is entitled to recover the same under the provisions of his will, as part of his estate. The judgment of the court was right, whatever may have been the reasons given for rendering it.

Let the judgment of the court below be affirmed.

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**THE NORTH GEORGIA MINING COMPANY, plaintiff in error
vs. CHARLES LATIMER, defendant in error.**

1. On the trial of an issue arising upon a contract entered into between A of the one part and B, C, D, E and F of the other part, all the parties being present and engaged in fixing the terms, A is not an incompetent witness because one of the parties of the other part has since died.
2. When one owning a tract of land supposed to contain minerals entered into a contract with another, in which it was stipulated that the other might enter upon the land, and test it at his own expense, and should the land contain the mineral (copper) as hoped for, the person testing should have the right to buy, at a fixed price, if the mine was equal in value to the Ducktown mines, the price to rise or fall accordingly as the mine was better or less valuable than said mines, and the testing was made and a valuable mine found, believed by the parties to be equal to the Ducktown mines, and the parties thereupon formed a joint stock company, the owner of the land taking one-fourth of the stock in full discharge of the amount agreed to be paid him:

Held, that in considering whether the consideration agreed to by the owner of the land, to-wit: one-fourth of the stock, was a fair and adequate consideration, the cost of testing, together with the risk of losing the whole expenditure in case of failure, was the test of the consideration paid by the person testing, and if that was equal, under the circumstances, to three-fourths of the value, the consideration was fair and adequate.

3. On a bill filed for specific performance, if the contract be in writing, is fair and just in all its parts, is certain and for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for it in other cases, and it was error in the judge to refuse to charge this as the law, in a case where the contract was in writing, and under the evidence it was competent for the jury to have found the contract, fair, just, certain, for an adequate consideration, and capable of being performed.

WARNER, Chief Justice, dissented.

Witness. Contracts. Consideration. Equity. Specific performance. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

The North Georgia Mining Company filed its bill against Charles Latimer, making, substantially, the following case:

The defendant, being the owner of lot of land number twenty, in the ninth district of the second section of originally Cherokee, now Fannin county, supposed to contain valuable

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mineral deposits, leased the same, with a conditional right of purchase, to R. G. A. Love and William Johnston, of the State of North Carolina, on March 17th, 1854, and said lessees, on the 17th day of the succeeding June, sold their said lease and contract of purchase to Edward M. Gault and Benjamin Johnston, who afterwards became associated with Nimrod S. Jarrett in testing said property, by which said Love and Johnston reserved to themselves one-fourth interest therein for the expense of testing the same. Gault, Johnston and Jarrett having discovered a vein of copper on said property, which was considered valuable, and being desirous of fulfilling their contract to pay for the same, to-wit: on January 22d, 1856, proposed to the other parties interested, to-wit: the defendant, R. G. A. Love and William Johnston, the formation of a joint stock company, which proposition was accepted, and the following agreement entered into:

“ DALTON, STATE OF GEORGIA, January 22d, 1856.

“ Whereas, on the 17th of March, 1854, R. G. A. Love and William Johnston, of North Carolina, obtained from Charles Latimer, of DeKalb county, in the State aforesaid, a lease, with a condition of purchase, on a lot of land lying and being in the ninth district and second section of originally Cherokee, now Fannin county, Georgia, being lot number twenty, and supposed to contain minerals of value; and whereas, on the 17th day of June following the date of said instrument, the said R. G. A. Love and William Johnston sold their said lease and contract of purchase to Edward M. Gault and Benjamin Johnston, of the state aforesaid, who afterwards became associated with Nimrod S. Jarrett, of Macon county, North Carolina, in testing the said property, by which the said Love and Johnston reserved to themselves one-fourth of said property free from the expense of testing the same, and the said Gault, Johnston and Jarrett became liable to pay the said Charles Latimer the purchase money of said property; and whereas, the said Gault, Johnston and Jarrett have discovered a vein of copper ore on said property, which they have opened in two several places, which is considered as

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valuable, and desirous of fulfilling their said contract of paying for the property, have proposed to the other parties interested a participation in the formation of a joint stock company on said property as a final and full settlement of the different interests therein, which was accepted by all the parties thereto on the following conditions, to-wit: They agree to form a joint stock company on the same, with a capital stock of \$300,000 00, consisting of thirty thousand shares of \$10 00 each, of which the said Charles Latimer is to be the owner of seven thousand five hundred shares, as a full consideration of the price of said land. The said R. G. A. Love and William Johnston are to own three thousand seven hundred and fifty shares each, being one-fourth of the capital stock, in pursuance of the sale made to said Gault and Benjamin Johnston, and the said William Johnston, one thousand eight hundred and seventy-five shares in addition, purchased from Benjamin Johnston, making, in all, two thousand six hundred and twenty-five shares. The said Edward M. Gault is to own two thousand eight hundred and twelve and a half shares. The said Nimrod S. Jarrett is to own five thousand six hundred and twenty-five shares, and the said Benjamin Johnston is to own four thousand six hundred and eighty-seven and a half shares, and the said Charles Latimer is to execute to the said company such title as he possesses to the said lot of land, in whatever manner may be advised as legal so soon as the charter can be obtained.

"In testimony of which, all the parties thereto agreeing, have hereunto set their hands and seals, date above written.

(Signed) "CHARLES LATIMER, [L. S.]
 "R. G. A. LOVE, [L. S.]
 "WILLIAM JOHNSTON, [L. S.]
 "EDWARD M. GAULT, [L. S.]
 "N. S. JARRETT, [L. S.]
 "BENJAMIN JOHNSTON. [L. S.]

"Witnesses:

(Signed) "SAMUEL DUNN,
 "W. A. McCRAULEY."

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Complainant was incorporated by an Act of the General Assembly of the State of Georgia, approved March 1st, 1856, with all the powers and privileges usually conferred upon mining companies; its charter will be found on page 442 of the Acts of 1855 and 1856. The capital stock of said corporation was made by said charter to consist of shares of the par value of \$500,000 00. It being considered to the interest of complainant to reduce the amount of the capital stock, the General Assembly, by an Act approved February 1st, 1869, diminished the same to the sum of \$30,000 00. On account of the heavy taxes imposed, and for other good reasons, the organization of said company was not perfected until the passage of said amendatory Act. On June 23d, 1869, the stockholders in said company met at the town of Dalton, according to previous notice and appointment, for the purpose of perfecting an organization of said company, at which time said stockholders adjourned to the 24th day of the same month. On the day last aforesaid, said company fully organized under said charter by the adoption of by-laws, and by the election of a board of directors, and said directors subsequently elected a president and book-keeper, whereby the organization of complainant became complete. Complainant thus became entitled to a specific performance of the hereinbefore recited contract on the part of said defendant. He, though often requested, has hitherto refused, and does now refuse, to execute a title to said lot of land to complainant. Prayer for specific performance. All discovery waived.

The answer of the defendant, being simply pleading, is omitted. The complainant introduced the following evidence:

1st. The Dalton contract of January 22d, 1856, set forth in the bill.

2d. The Cartersville contract of April 3d, 1856, as follows:

“CARTERSVILLE, GEORGIA, April 3d, 1856.

“This agreement between the undersigned members of the company interested in lot of land known as number twenty,

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ninth district and seventh section of Fannin county, Georgia, witnesseth, that N. S. Jarrett, Edward M. Gault, Charles Latimer, are hereby appointed as agents to sell the property in question under the following regulations, conditions and restrictions—that is to say, they are not to sell said property under the price of \$135,000 00, unless further advised; they are to receive as commissions for selling, in the event of a sale, five per cent. on the same sum of \$135,000 00; for any sum over that amount, not exceeding \$200,000 00, seven and one-half per cent., and for any sum over \$200,000 00, ten per cent. out of the sale made, whether in cash, stock, or otherwise, in the same manner as the condition of the sale is made, and in the event of no sale being effected, the company is to bear the expense of traveling and incidental expenses and board, in proportion to the stock owned by each individual in the company, as made known in the articles of agreement entered into at Dalton, on 22d of June last, and each person named therein to receive his proportion of the price, on payment, of said property in like manner, according to the amount of shares held therein, whether in cash, stock, notes or otherwise. It is further understood that in making sales the said agents are to have power to procure the services of any agent or assistants they may deem proper and expedient, for the payment of which, together with any other contingent expenses, in the event of an actual and *bona fide* sale being made, shall fall on the whole company alike, in proportion to their respective shares, provided the net amount of sales, after deducting the same, shall not fall under \$135,000 00, but otherwise the agents only are responsible. And further, it is understood and agreed on, that in case said agents shall fail to effect a sale under the present arrangements, and shall be advised and believe that an organization under the present charter would enable them to consummate the same, the parties hereto are to meet at this place, or elsewhere agreed on, either by themselves, or attorney or *proxy*, and organize with as little delay as possible, on reasonable notice being given to the parties by said agents. In pursuance of the above, a power of attorney,

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signed by the other members of the company, authorizing and empowering the said agents to carry out the objects set forth in the foregoing agreement, is to be forthwith executed and delivered to said agents.

"In testimony of which, all the parties interested have hereunto set their hands and affixed their seals, date before written. (Signed in duplicate.)

"N. S. JARRETT, [L. S.]
"CHARLES LATIMER, [L. S.]
"EDWARD M. GAULT, [L. S.]
"BENJAMIN JOHNSTON, [L. S.]
"R. G. A. LOVE, [L. S.]
"WILLIAM JOHNSTON, [L. S.]

"Signed, sealed and delivered in presence of us.
(Signed) "J. A. MADDOX,
"THOMAS ALLEY, J. P."

3d. The power of attorney executed by defendant to Thomas L. Clingman to sell said lot, with the approval of the other parties interested therein, as follows:

"GEORGIA—FULTON COUNTY:

"This is to certify and make known to all whom it may concern, that I have this day authorized and empowered Thomas L. Clingman to sell lot of land number twenty, ninth district and second section of originally Cherokee, now Fannin county, Georgia, containing one hundred and sixty (160) acres, (those owning equitable interests therein approving and concurring,) for \$100,000 00. Now I agree, (those owning equitable interests in said lot, as per contract signed and sealed at Dalton, state aforesaid, on the 22d day of January, 1856, approving and concurring therein,) that the said T. L. Clingman is to retain and keep, for his own proper use and benefit, every dollar for which he may sell said lot of land for, over and above \$100,000 00, whatever that sum may be. This is to be in consideration of said T. L. Clingman's services in the premises.

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"In witness whereof I have hereunto set my hand and seal, May 22d, 1866.

CHARLES LATIMER, [L. S.]

(Witness)

"J. H. STERCHI, N. P.

"We approve and ratify the above.

(Signed) "R. G. A. LOVE,

"J. A. R. HANKS,

"Administrator of estate of E. M. Gault, deceased,

"N. S. JARRETT,

"BENJAMIN JOHNSTON,

"WILLIAM JOHNSTON,

"by Benjamin Johnston."

"We, Benjamin Johnston, for myself, and Benjamin Johnston, as agent for William Johnston, and N. S. Jarrett and J. A. R. Hanks, administrator of the estate of E. M. Gault, and R. G. A. Love, those owning equitable interests in said lot of land, as per contract signed and sealed in Dalton, Georgia, on the 22d day of January, 1856, do agree and approve of the power of attorney to sell said lot of land, number twenty, ninth district and second section of originally Cherokee, now Fannin county, containing one hundred and sixty acres, upon the terms and conditions expressed in said power of attorney, to T. L. Clingman, of Buncombe county, North Carolina.

(Signed) "R. G. A. LOVE,
"BENJAMIN JOHNSTON,
"WILLIAM JOHNSTON,
"by Benjamin Johnston.

"N. S. JARRETT,

"J. A. R. HANKS,

"Administrator of E. M. Gault, by R. G. A. Love."

"Witness:

(Signed) "B. M. BRAWNER,
"J. H. STERCHI, N. P."

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4th. The charter of the complainant and the Act of 1869, amendatory thereto.

5th. The minutes of complainant, showing its organization on June 24th, 1869.

6th. J. A. R. Hanks, sworn: As the administrator of E. M. Gault, he was invited to meet the other parties in Atlanta, in 1866. He, Jarrett, Love, Benjamin Johnston and defendant, met at the city aforesaid, and the power of attorney to Clingman was executed by defendant. Witness wrote the power, and read it to defendant and the other parties. Defendant signed it without objection or condition other than it expressed. At this meeting the subject of the organization of the company was discussed. The amount of taxation which an organization under the original charter would involve was urged as a reason why an amendment to the charter should be procured and the capital reduced, so that, in the event Clingman failed to sell the property, the company could at once organize without incurring such heavy and onerous taxation. Witness cannot say positively that the defendant was present at the discussion of this question. He thinks that defendant and the other parties were together for several hours. Witness was requested to procure an amendment to the charter reducing the capital stock to \$30,000 00, but does not recollect that the defendant joined in said request. Supposes he drew the bill himself. He handed to defendant a written notice of the proposed meeting in Dalton to organize the company. This notice was handed to defendant on June 12th, 1869, and the meeting was on the 23d of the same month. Witness had other interviews with the defendant. Never, at any time, heard him say or intimate that any fraud, mistake or omission had incurred in the execution of the Dalton contract of January 22d, 1856. Since the organization of the company at Dalton, on June 24th, 1869, there has been no regular meeting of the members or directors. E. M. Gault died in February or March, 1866.

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The complainant closed. The defendant introduced the following testimony:

1st. An instrument, as follows:

"Whereas, R. G. A. Love, of Haywood, North Carolina, hath this day, 17th of March, 1854, made known a desire to enter upon a lot of land owned by me, which lot of land is known as number twenty, district ninth, section second, originally Cherokee county, Georgia, and afterwards Gilmer county, on the waters of Fighting Town creek, and test for minerals, with a condition of purchasing the same:

"These are therefore to certify and make known to all whom it may concern, that I have given, and by these presents do give, the said Love privilege to do so, and he is to prosecute the test vigorously as soon as he can do so with safety to himself, owing to litigation being going on at this time about said lot of land, with these conditions:

"After the said Love gets possession he is to prosecute the test vigorously and in good faith, and he is to have a reasonable time to complete it in, and when completed, if the lot of land aforesaid should prove to have and contain as valuable a vein of copper ore as the average mines in Ducktown, Polk county, Tennessee, the said Love agrees to pay me the sum of \$50,000 00 for it, and I agree and hereby bind myself, my heirs, executors and administrators, to make him or his heirs a good and sufficient deed of conveyance for the same, with everything appertaining to it. And if the lot of land should, after it is thus tested and developed, prove to have a better and more valuable copper vein than the average mines in Ducktown, Tennessee, now open and in operation, the price of the mine is to be raised in proportion as its value is over the value of the average mines in Ducktown, Tennessee, and if, after being tested and developed as aforesaid, it should turn out not to have and contain as valuable a vein of copper ore as the average copper mines now opened and in operation in Ducktown, Polk county, Tennessee, the price of the said lot of land is to be reduced in proportion to its want of value or falling off, compared with them. When the mine is thus tested and its

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price fixed, the said Love agrees either to take it at the price that may be agreed upon, or go off of it, lose his labor, and give me full possession of the same. If the said Love and myself cannot agree upon the comparative value of the mine, we agree to leave it to disinterested, scientific men, such as may be agreed upon by us. And if he agrees to take it, he is to pay me the full amount in twelve equal monthly installments, with good and sufficient security to his notes, that he faithfully performs and meets the payments. The title of the said lot of land is to remain in me until each and all the installments are paid, then I am to execute the title to the said Love as aforesaid.

"In witness whereof I have hereunto set my hand and affixed my seal, on the day and date above written.

(Signed) "CHARLES LATIMER, [L. S.]
 "R. G. A. LOVE, [L. S.]

"Attest:

(Signed) "B. F. MOULDEN."

2d. Charles Latimer, the defendant, next offered himself as a witness. It was objected to his competency that E. M. Gault, one of the parties to said Dalton contract of January 22d, 1856, and one of the stockholders of complainant, was dead. The objection was overruled, and complainant excepted.

He testified substantially as follows: At the time he entered into the contract of 17th of March, 1854, with Love, he did not know William Johnston. Does not know how Gault, Benjamin J. Johnson and Jarrett acquired an interest in said contract. Never consented to take them for the purchase money mentioned in said contract in lieu of Love. Was informed by Love at the time of said contract that a man by the name of Nimrod S. Jarrett set up some sort of a claim to said land. Was informed by Gault, Benjamin Johnston and Jarrett, that they had tested said land in two places and had discovered copper ore, and that they thought the mine rich and valuable. Defendant never made any objection nor con-

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sented to the assignment of the contract with Love to said Gault, Benjamin Johnston and Jarrett; he was never consulted with reference to the same. After the copper ore was discovered, Benjamin Johnston and Gault invited witness to meet the parties at Dalton on January 22d, 1856, to arrange and settle the various interests under said contract with Love. He met the appointment, taking his little son with him. On the way to Dalton, his child was taken sick, threatened with pneumonia, and after their arrival at that point, seemed to grow rapidly worse. He met at Dalton Love, William Johnston, Gault, Benjamin Johnston and Nimrod S. Jarrett. The discovery of copper on the lot had rendered it, as all supposed, very valuable, but he had always had such an opinion of the property. Various suggestions were made and propositions submitted, some stating that it was the custom of the country in the mining region for those who made tests and discovered copper to have a one-half interest in the land. Defendant would not consent to this suggestion. He insisted, as his ultimatum, that he must receive \$50,000 00 for the lot; also, that under his contract with Love, they were not entitled to anything for testing. This discussion continued until a late hour in the night. His son was so sick that he felt great uneasiness about him. He was passing frequently to and from his son's room whilst the discussion was going on. Finally, at a late hour of the night, some one proposed the formation of a joint stock company as the best way of settling the various interests. This was consented to, and William Johnston was appointed to draw up the agreement. He performed this service, and read the agreement in an audible and distinct tone to the parties before mentioned, after which it was signed. After the signatures were attached, some one present said something about each one of the parties taking a copy. On the next morning some one handed to him a copy of the contract. It was late at night when said contract was signed; in fact, it was about four o'clock the next morning, and witness' mind was much disturbed during the whole discussion on account of the condition of his son. He insisted, as his ultimatum,

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matum, that he must have \$50,000 00 for the land, but the other parties insisted that they did not then have the money. He refused to yield this point, and it was finally the understanding of all the parties that he was to have the \$50,000 00 certain, and as they were not then able to pay that amount, he urged that he ought to have something for the delay which had already taken place, and which would take place, in the payment thereof. It was then agreed that he was to have one-fourth of the stock over and above the \$50,000 00 to remunerate him for the delay. Witness insisted, from the beginning unto the end of said discussion, that he was entitled to stand upon said contract with Love, and that said \$50,000 00 was to be paid out of the first stock of the company sold, and enough stock was to be sold to pay said sum, even if it took all of it. He did not observe that this stipulation was not in said contract when he signed it. Did not read the copy furnished to him until the next day, just before his arrival at the town of Cartersville, at which place he intended to stop to take his sick son to his daughter's house. He, then, for the first time, discovered the omission. He did not return and notify the other parties of the mistake, for the reason that when he left Dalton they had their horses saddled, were cloaked and about to start. Knew where each and all of said parties lived, but never wrote to them, or either of them, about any mistake or error in said contract. Met said parties again at Cartersville, on April 3d, 1856. Went with Gault and Jarrett to Savannah to sell said land, under the Cartersville agreement. Saw William Johnston at Morganton, and saw all the parties at the Atlanta meeting, in May, 1866, but never, at any time or in any way, said or intimated to said parties, or either of them, that there was any mistake or error in said Dalton contract. He was present at the Cartersville meeting, on April 3d, 1856, and signed the contract of that date. Refused to accept the charter, because it fixed the capital stock at \$500,000 00, and this would make the taxes too onerous. It was therefore agreed to sell the land without an organization under the charter, if it could be done,

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in order to save taxes. Witness accepted the agency under that agreement, and went to Savannah in company with Gault and Jarrett, and remained there eight or ten days, trying to sell said land. Attended the meeting at Atlanta in May, 1866. Did not consent to any amendment of said charter, or to any organization thereunder. Has been in very feeble health for fifteen or twenty years. Quit business some fifteen years ago on account of ill health. Rented the land in 1864 to one Phillips for one year for one-half the profits. Received as rent for that year, \$2,500 00. Is now seventy-five years of age. Believes the mine to be very valuable. No certificates of stock were ever issued or put on the market that witness ever heard of, and he cannot, for this reason, give any opinion as to the value of the stock. Cannot say that any fraud was practiced on him at the time of his signing the Dalton contract, or that William Johnston read it differently from what was written therein, but thought it contained his terms, as heretofore stated, or he would not have signed it. Did not give notice of any error or mistake in the Dalton contract, because he came to the conclusion in his own mind that they intended to practice a fraud on him at the time it was executed. He simply determined to make no deed until he was paid his \$50,000 00. At the Cartersville meeting, the parties notified defendant that they had appointed Gault and Jarrett to go to Savannah to sell the land, about which he was not consulted, though he was there. Defendant told them that if they did not sell it to his notion he would not make a deed, and they then appointed him in connection with said Gault and Jarrett.

The defendant closed. The complainant introduced the answers of R. G. A. Love to a set of interrogatories substantially as follows:

After examining the lot in controversy he thought there was a fair chance of finding copper upon it, and learning that the defendant was the owner thereof, he went to see him at his house in DeKalb county, Georgia. He stated to the defendant that it would require the expenditure of a good deal of money

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and time to make a satisfactory test of the resources of the lot, and that if the defendant would satisfy him for making the test, he and his partner, Mr. William Johnston, who were engaged at that time in hunting for copper, would make a search for the same. After some discussion the contract of lease was entered into. He has not a duplicate of said contract. When it was satisfied by the agreement entered into at Dalton, he lost sight of said paper, but does not remember whether it was handed to defendant, or destroyed, or what became of it. When he returned from DeKalb county he found one Nimrod S. Jarrett in possession of said lot, under claim of title from some other person, and fearing that he would be put to great trouble in getting possession of the same, he sold his contract with defendant to Gault and Benjamin Johnston, who afterwards became associated with Jarrett. They went to work on the lot and after a very thorough examination found copper on it in two places. Was present at the Dalton meeting. The parties wished defendant, William Johnston and witness to take steps to ascertain the value of the land so that they could proceed to pay for it upon the terms provided in the aforesaid lease and obtain a title. Some time was consumed in discussing how this value should be arrived at. A proposition was then made that a joint stock company be formed with a capital of \$300,000 00, divided into thirty thousand shares of \$10 00 each, and that the defendant receive a certain number of shares as a full and final consideration for the land. This suggestion, after much discussion, was acquiesced in by all the parties, each agreeing to take his interest in stock. A contract to the above effect was consequently drawn and signed by all the parties. The land, exclusive of its mineral resources, is not worth more than \$100 00. It was by the labor and expense of Gault, Jarrett and Benjamin Johnston, under the contract of William Johnston and himself, that its mineral wealth was developed. On the first occasion on which he met defendant, after William Johnston and witness had sold their contract of lease to Gault and Benjamin Johnston, he mentioned this fact, and also told him that Gault

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and Benjamin Johnston had associated Jarrett with them, and in this way had settled his claim to the land. Defendant expressed himself well satisfied with the arrangement. The company instructed Gault, defendant and Jarrett, to take steps to procure a charter. After our first meeting at Dalton, we met at Cartersville in the month of April following. We failed to organize under the charter which the General Assembly had granted, for the reason that the market value of copper property was greatly reduced, and for the additional reason that we would be compelled to pay taxes on a valuation of \$500,000 00, the amount of the capital stock. The company did not work the mine for the reason that they desired to sell it, and for the further reason that the mine as developed showed very well, and they feared by working, it might not show so well further down. These were substantially the views of each member of the company at every meeting at which the matter was discussed. Never heard the defendant say anything about an omission through fraud or mistake in the written agreement made at Dalton; never heard that he made any such pretensions until after this suit was brought. Saw him frequently after the Dalton meeting; was present when the power of attorney from defendant to Clingman to sell said property, was executed. Defendant agreed to sign said instrument provided the other parties would give him an instrument approving his action in the premises. He stated that his obligation was out to make a title to the company when organized and that the parties interested must approve his power of attorney to Clingman. We agreed to do so. Such an instrument was accordingly executed and our approval placed thereon at the request of defendant.

Was present when the company organized under the Act of incorporation and the amendment thereto. Three-fourths of the entire stock was represented. William Johnston was not present when the contract of lease was made by defendant, but he thinks his name was inserted in it. If it was not, it was certainly an oversight, because witness and defendant both understood that Johnston was interested in it. When

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the original contract with defendant was canceled, and the Dalton agreement entered into, it was either destroyed or handed to defendant. The Dalton contract was carefully read over, clause by clause, in the presence of all the parties, before it was signed. The stock of the company was supposed by us to be worth \$300,000 00. The truth is, we all felt like we had made a fortune; we, by testing it, and defendant, by having it tested by us. The defendant received his pay in the labor and expense expended by the other parties on the property in testing it, in taking up the claim of Jarrett, and in canceling the contract which William Johnston and witness had on him. The amendment to the charter was procured by Hanks, the administrator of Gault, at the instance of all the parties interested. He was so authorized at the Atlanta meeting. The defendant was present at said meeting. If he was not present at the time the agreement as to the amendment of the charter was entered into, witness does not know the reason of his absence.

Also, the answers of William Johnston, of Benjamin Johnston, and of Nimrod S. Jarrett, to sets of interrogatories. They substantially corroborated the testimony of Love.

The jury found for the defendant. The complainant moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in allowing the defendant to testify, Edward M. Gault, one of the parties to the contract executed at Dalton, on January 22d, 1856, being dead.

2d. Because the court erred in refusing to charge the jury as follows: "When a contract for the sale of land is in writing, is fair and just in all its parts, is certain, is for an adequate consideration and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance of it, as it is for a court of law to give damages for it in other cases."

The motion was overruled, and complainant excepted.

W. H. DABNEY; J. A. R. HANKS, for plaintiff in error.

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J. M. CALHOUN & SON; L. E. BLECKLEY, by N. J. HAMMOND, for defendant.

McCAY, Judge.

1. My brother Trippe and myself join with the Chief Justice in holding that the death of one of these contractors does not exclude Mr. Latimer as a witness. In the first place, the party to the suit is a corporation, and the death of one of its members is not within either the letter or the spirit of the exceptions in the evidence Act of 1866. Nor, as we think, does the case, even were the original contractors parties, come within the spirit of the exceptions. Here are several of the original contractors living who may and do confront Mr. Latimer, and the mischief intended to be guarded against by the exceptions, does not at all exist.

2. It has long been the settled rule, both in this country and in England, that if a contract for land be in writing and be fair in all its parts, certain and for an adequate consideration, it is as much a matter of course for equity to enforce it as it is for a court of law to give damages for it in other cases. It is not a question of discretion. The party seeking redress has a right, and it is the duty of a court of equity to enforce it by decree. It is only when the contract is unfair or uncertain, or the price inadequate, that the discretion to refuse arises: Code, 3190; See *Chance vs. Bell*, 20 *Georgia*, 142, where the rule is fully and strongly stated.

3. In this case the contract is in writing, and whilst there is some evidence, to-wit: that of Mr. Latimer, of fraud, yet we doubt if, under the whole evidence, that had much weight with the jury. It seems to us clear that the verdict turned on the charge of the court, "that the jury had a discretion to decree or refuse to decree specific performance." The judge refused to charge, on request, the principle we have alluded to. In the argument here it was admitted that this was the rule in the cases it covers. But it was contended that the case at bar did not authorize the charge, because the facts

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showed there was no consideration, or, at best, a very inadequate consideration. It was contended that the Dalton contract, the foundation of the bill, was without consideration, that the land belonged to Latimer at first, and that, in effect, this agreement was an agreement to give to the plaintiff three-fourths of his own land. The line of argument by which this strange conclusion is arrived at strikes me with astonishment. It is based on the assumption that if A has a parcel of land and contracts with B, that if he, B, will, at his own risk, develope a valuable mine upon it, he, B, may have three-fourths of it, the agreement is without consideration. It is said the land and all that is on it belongs to A, and that, as by such contract, he only retains one-fourth of it, he gives the other three-fourths of it away. But those who reason thus forget that the minerals, though there, were hidden, and worthless because hidden; that it cost money, labor and *risk* to find them, and that the land gets its real value from the finding. There is just as much logic in saying that if one should agree to give one-fourth of his land to one who should, at his own expense, clear it, this would be a gift. To my mind it is very clear that if I contract with a man to give him three-fourths of a tract of land if he will go upon it and lay bare a valuable mine, by his skill, labor and capital, I only give a fair *quid pro quo*. My land is of but little value. I am not willing to take the risk of expending money in sinking shafts, etc., and if I can get a man to take this risk, and to expend perhaps three times as much as my land is worth, I to run no risk, and he to lose his money if he fails, I may do a very good thing for myself. That his skill, labor and capital, in fact, do, if he succeeds, render my land more valuable in the market than it was before, is unquestionable, and it seems to me absurd to say, if I make such a contract, that it is without consideration.

It is said that in this case it was the express contract that Love was to test the land at his own expense. Certainly. And it is that very stipulation which makes the consideration, or, at least, a large part of it. Love was to run *all the risk*.

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Had the agreement been that it was to be at Latimer's expense, Love's right to remuneration would be only for his labor or skill. But just because Love *was* to bear all the expense and take *all the risk*—just because, if there was a failure, Love was to lose his time, labor, skill and money, and Latimer to have the land *as it was before*, just for this reason, it would be fair, and just, and reasonable, that if Love *should* succeed, and by his risk and labor and skill, make Latimer's land, with no work or labor of his own, of great value in the market, Love should reap a large share of the profits of the enterprise. Why should Love and his associates go to work to develop Latimer's land? Why should *they* spend their time, money and skill upon it, if, when the prize was won, they were to turn the land over to Latimer, or pay him *the value of it*? Such conduct would be childish, an act of pure benevolence, that among business men would be laughed at as folly. On the other hand, I doubt if there be a man in Georgia who owns a lot of land, supposed to have minerals upon it, but which requires an outlay of \$2,500 00 to test, who would not be glad to give three-fourths of it to one who, by his labor, skill and investment upon it, would make it as valuable in the market as the Ducktown copper mines. And it is equally clear that there are very few men of any experience in such things who would be willing to risk \$2,500.00 in testing a lot, even under an agreement to get three-fourths of it if the mineral was found. The truth is, that such things are so uncertain, that the risk of so large a sum ought to insure a very large reward upon success. The true rule of division between the parties, on equitable principles, by which both would get equity, would be that the owner of land should have such a share as his investment, to-wit: the value of his land before testing, with no risk of the loss of anything, is proportioned to the time, skill and money spent by the other party, with the risk of the loss of all. Whether this is one-half, one-fourth, one-tenth, or any other fraction, would depend on circumstances, though, ordinarily, one-fourth would, in my judgment, be a good share for the land

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owner. It does not appear positively what the parties supposed a lot equal to the Ducktown mines would be worth. The Love contract fixed, however, upon \$50,000 00 as Mr. Latimer's price for the land if it should be equal to those mines. And as all parties seem to have agreed that Mr. Latimer was entitled to his \$50,000 00, and as they also agreed the land was worth \$300,000 00, it would seem to follow that \$300,000 00 was what they supposed the land had been counted worth at the time the Love contract was made, should it turn out equal to Ducktown; \$50,000 00 is one-sixth of \$300,000 00. And I do not believe there is a man in the state who would not be glad to give five-sixths of any undeveloped lot to one who should *prove it*, by a test, at his own expense, to be equal to the Ducktown mines.

When, therefore, these parties met at Dalton, in 1856, it is a great mistake to say that this was Latimer's land. Under the contract with Love the plaintiffs had acquired an equitable interest in it. They had the *right*, fairly acquired and honestly paid for, under a written agreement, to buy it at a price to be fixed by its relative value as compared with Ducktown. Had there been no Dalton contract, and this been a bill to compel the specific performance of the Love contract, how would the matter stand? Love was to test the land at his own expense. If he found copper he was to have a right to buy for \$50,000 00, in case he had found a Ducktown, and *for as much less as the mine should be of less value than the Ducktown*. The parties would, *without the Dalton contract*, have a right to a decree on the payment by the complainant of a sum bearing the same relation to \$50,000 00 as this lot bears to Ducktown. When they met at Dalton, the very first thing to settle was, what was the value of the new discovery as compared with the Ducktown mines? All parties seem to have agreed that the testing was a success; that the plaintiffs, by their skill, labor and expenditure, had developed a valuable property out of a lot of land of but trifling value. It seems to have been agreed all round that \$50,000 00 was the price to be paid. Why? Because that was the value

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of the land? Evidently not. The very fixing of this price shows that they considered it equal to Ducktown, and, so considering, that it was worth \$300,000 00. Yet, by common consent, and by the written agreement with Love, Love and his associates had the *right* to buy for \$50,000 00. It follows, it seems to me, incontestibly, that they all, including Mr. Latimer, recognized that the meaning of his contract with Love was, that if a valuable mine was found Love should have the right to buy it for one-sixth of its value; that thus, and thus only, was Love to be compensated for his labor, skill and *risk of the money* necessary to test it.

As I have said, I do not think this an unfair, but a just and reasonable contract, one that almost any owner of undeveloped mineral land would be willing to make, and one that but few speculators would care to go into on the other side. Latimer knew, and Love knew, that if a Ducktown mine was found \$50,000 00 was but a small fraction of its value. But they also knew that there were large chances that Love would lose his time, his labor and his capital. No one who has ever heard or read of the uncertainties of such enterprizes can hesitate as to which party, under this Love contract, was taking the greatest risk. By the original contract, therefore, it is plain that if a mine of value was found Love had a right to buy the land at far less than would *then* be its value, and this for the plain reason that in such a case it would be his skill, labor and risk of capital that gave it value.

Assuming that this was the state of the case, how can it be said to be unfair to Mr. Latimer? How can it be called a foolish contract, or one not founded on an adequate consideration, if he agreed to take for his \$50,000 00 one-fourth of the land, or one-fourth of the stock of a company formed by the owners of the land? If they were right in their estimate, he got \$75,000 00 instead of \$50,000 00 for his land; and if they were not right in their estimate, *he was not entitled to \$50,000 00*. That sum was to be lessened according to the failure of the mine to come up to Ducktown. It was only on the presumption that the land was worth \$300,000 00 that

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he was to get \$50,000 00 for it. It seems to me absurd to say that this is not a fair discharge of the Love contract, and that, instead of \$50,000 00, Mr. Latimer only gets stock, which is mere paper, and may be, perhaps, is worth nothing. If it be worth nothing, it is because the land is worth nothing. He was not, by his contract, to have \$50,000 00 at all events, but only if the land is equal to Ducktown. If it be equal to Ducktown—if it be worth a sum which would entitle him to \$50,000 00—his one-fourth of the stock is worth \$75,000 00. True, it is not cash, and perhaps it may be a long time before he will get \$75,000 00 for it, but if so, it will be only because it is not a Ducktown copper vein—only because he and they were mistaken in supposing he was entitled to \$50,000 00. He gets by the Dalton contract more than his contract with Love called for. He gets one-fourth instead of one-sixth of the land, and if he saw fit to take his \$50,000 00 in stock, based upon the same estimate of the value of the land that fixed \$50,000 00 as his interest in it “after the mine was found,” is that unfair? I do not think so, and a jury might well think this Dalton contract was a fair and just one, based on an adequate consideration, according to the evidence of Mr. Latimer himself. He was the owner of a tract of land of but little value, save upon the idea that it contained a copper mine. It would cost a good deal to test it. As all experience proves, money thus spent is generally thrown away, as valuable copper lots are very, very scarce. Mr. Love was ready to take the risk. *He* would spend his time, his labor and his money. If there was a failure, the loss was to be his, and his alone. Latimer ran no risk. It was but fair that the man who ran the risk should, if successful, get the largest share. They fixed Ducktown as the standard. If the test was a failure, Mr. Latimer lost nothing; he still had his land. But Love lost, as the proof shows, \$2,500 00. On the other hand, if a Ducktown mine was the result, Mr. Latimer's land, worth almost nothing before the test, now made him a rich man. He got \$50,000 00 for it.

The Dalton contract is based on the assumption that a new

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Ducktown was found. On that assumption, \$300,000 00 is low for the land, and \$75,000 00 in stock is a fair substitute for the \$50,000 00. If the stock is not worth the money, it is not a Ducktown. Just as much as it falls below Ducktown, \$50,000 00 is too much for Mr. Latimer's interest. He does not get \$50,000 00 for his land in cash, which he was to get if it proved a Ducktown; but he does get \$75,000 00 in stock, which is worth \$75,000 00 if it is a Ducktown. By the very terms of his contract with Love, he was to sell his land at a price to be proportioned according to its approach to Ducktown. He and they, at Dalton, evidently believed they had got a Ducktown, since it was understood that he was entitled to \$50,000 00. If he sold at all, *some* comparison with Ducktown was to be made. They all agreed it was equal, and fixed \$50,000 00 as the price. If they were right, his stock is worth more than \$50,000 00. If they were not, then \$50,000 00 is too much. In other words, the Love contract is itself dependent on the value of the land, and the Dalton contract does nothing but keep up the same idea. Mr. Latimer, instead of \$50,000 00 in cash, was willing to take \$75,000 00 in stock, in a company which had a mine equal to Ducktown. If this be so, he is not hurt. If it be not so, and the land be worthless, Love and his associates have lost more than he has. As a matter of course, in saying so decidedly that this was a fair contract, we only give our opinion, and the reasons for it. We do not intend to dictate to a jury who may think otherwise. We express this opinion because the effect of the refusal of the judge to charge as requested was, in effect, the expression of a different opinion.

To conclude, then, upon this point, my brother TRIPPE and I think a jury might well consider that this Dalton trade was not only founded on a valuable consideration, but was in fact only putting into another form the Love contract which nobody pretends was anything but fair and reasonable.

We think, therefore, the court erred in refusing to charge "that it was a matter of course for equity to decree specific performance of a contract for the sale of land if it was in

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writing and was fair and for an adequate consideration," since there was evidence to justify and require it. For this reason we think there ought to be a new trial. We do not think the jury could, under the evidence, have given much weight to the evidence of imposition or fraud in the execution of the Dalton contract. It is not a very reasonable story, to say the least of it. It is contradicted by everybody else, and it is utterly inconsistent with the frequent acts of Latimer in subsequent ratification and approval of it. As to the variance between the corporation as actually got and that agreed upon, that is a small matter—more a matter of form than substance—and we cannot suppose the verdict was based upon that. Mr. Latimer seems always to have been perfectly willing to take his \$50,000 00 in stock, provided only the stock was worth what it would be if they had in fact found a Ducktown; and had they found a purchaser, even at a less rate than \$300,000, it is quite plain he would have been satisfied with his \$75,000 in stock.

Judgment reversed.

TRIPPE, Judge, concurred, but furnished no written opinion.

WARNER, Chief Justice, dissenting.

This was a bill filed by the complainant against the defendant, praying for a specific execution of an alleged contract for the sale of a lot of land. The defendant resisted the complainant's right to a specific execution of the alleged contract on the ground of mistake and fraud in the procurement of it, and because the consideration was inadequate. On the trial the jury found a verdict for the defendant. A motion was made for a new trial on the several grounds set forth in the record, which was overruled, and the complainant excepted.

It appears from the evidence that what is called the Dalton contract was made between the defendant and six other persons, one of whom was Gault, who was dead at the time of the trial. All the parties were corporators, and named in the Act of incorporation as such. The other corporators, except

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Gault, testified as to what took place at the time the Dalton contract was executed, which was prior to the act of incorporation; and the question is, whether Latimer, the defendant, was a competent witness as against the living corporators, Gault being dead. Although one of the joint contractors may be dead, still, when they have been all incorporated into a body politic, as in this case, and have the legal capacity to sue the defendant as a complainant, and as the living corporators were competent witnesses against him in favor of the complainant, the defendant was also a competent witness to confront the living witnesses who were sworn in favor of the complainant. To hold otherwise would be contrary to the true intent and spirit of the Act of 1866, defining the competency of witnesses. The facts of this case do not bring it within the exceptions of that Act, and there was no error in admitting the defendant to testify against the living parties to the contract who were sworn for the complainant.

There was no error in the refusal of the court to give in charge to the jury the first head-note in the case of *Chance vs. Beall*, 20 *Georgia Reports*, 142, as requested, in view of the facts of this case, to-wit: "Where a contract for the sale of land is in writing, is certain and fair in all its parts, is for an adequate consideration and capable of being performed, it is just as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for it in other cases." This request was properly refused, because it did not state that it was *discretionary* with a court of equity to decree a specific performance of the contract as is stated in the opinion of the court in that case, and because it was not the law applicable to the facts of this case, as declared by the 3190th section of the Code, to-wit: "Mere inadequacy of price, though not sufficient to rescind a contract, may justify the court in refusing to decree a specific performance; so, also, any other fact showing the contract to be unfair, or unjust, or against good conscience."

In looking through the record of this case I find no legal errors alleged, except such as are merely *colorable* for the pur-

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pose of having the verdict of the jury set aside, on the ground that it is contrary to the evidence and the weight of the evidence. The main object of the plaintiff in error is to get rid of the verdict and obtain a new trial, as is generally the case with the losing party. In my judgment, the case was fairly submitted to the jury under the charge of the court, and I cannot say that the verdict was wrong in refusing to decree a specific performance of the contract, under the evidence disclosed in the record. The defendant contracted with Love to test the lot of land for minerals at his own expense, and if it proved to be as valuable for copper ore as the Ducktown mines, then the defendant agreed to sell the lot to him for \$50,000 00. Love tested the lot, said it was valuable for copper ore, but never paid or tendered in payment to the defendant the \$50,000 00, or any part thereof. But it is said that because Love, with whom the defendant made the contract, thought proper to associate with him other parties in testing the lot, and because those other parties and the defendant met at Dalton and agreed to form a joint stock company and divide the defendant's land into stock without paying him the \$50,000 00, that he has been paid for his land in the stock which the joint stock company issued to him. It may be true that the defendant received, *nominally*, more than \$50,000 00 in the stock of the company for his land, but I fail to perceive that he has ever received anything more substantial for it than the company's stock.

It is claimed by Love and his associates that they have expended \$2,500 00 in testing the land for minerals, and, therefore, had acquired an interest in the land under the contract with the defendant; whereas, the truth is, that under the Love contract, the land was to be tested at his own risk and expense, and if found valuable, he had the right to purchase the land of defendant at the price fixed, and agreed either to do so or to go off the land, lose his labor, and give possession of it to the defendant. The fallacy in the argument for the complainant consist in the *assumption* that Love and his associates, under the contract with defendant, acquired an interest in his

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land by expending money in testing it for mineral ore. The contract was that Love was to test the land at his own cost, with the privilege of purchasing it at \$50,000 00, and if he did not do so, was to go off the land and lose his labor. It is not pretended that Love and his associates have ever paid the defendant the \$50,000 00, or any part thereof, for his land, except in stock, as before stated. If the contract between Love and the defendant had been that Love was to test the land for mineral ore, and if found valuable, the defendant was to convey to him an interest in the land, and Love had done so, and expended \$2,500 00 in testing it for the benefit of himself and defendant, then he would have had an interest in the land; but that was not the contract. Love was to test the land at his own expense, with the right to purchase it, if found valuable, for the sum of \$50,000 00, and the defendant was bound to make him a deed when he paid him that amount of money for it, and if Love did not do so, he was to go off the land and lose his labor in testing it. When the complainants and defendant met at Dalton and formed the joint stock company, the complainants had just about the same interest in the defendant's land, under the Love contract, and the same assurance in pretending to claim any interest in it, as a certain notorious character had when he took our Savior up into an exceeding high mountain and showed him all the kingdoms of the world, and promised to give it all if he would fall down and worship him. But the joint stock company was formed with a capital stock of \$300,000 00, all based on the defendant's land, and nothing else. The stock was divided into shares of \$10 00 each and distributed amongst the parties, the defendant receiving seven thousand five hundred shares thereof, in full consideration of the \$50,000 00 that was to be paid him for his land, under the Love contract. If the seven thousand five hundred shares of stock in this joint stock company, paid to the defendant for his land, was based on any other valuable consideration, either in money or property than the defendant's *own land*, it has escaped my obser-

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vation, and I presume it escaped the observation of the jury on the trial of the case.

In view of the evidence contained in the record, the practical effect of the Dalton contract, so far as the payment for the defendant's land is concerned, is very much like the old game of "Heads, *I win*; tails, *you lose*."

I am of the opinion that the judgment of the court below should be affirmed.

**CHARLES DAVIS *et al.*, plaintiffs in error, vs. JAMES GURLEY,
defendant in error.**

1. The right of common of pasture on wild lands cannot, in Georgia, be founded on the fact that one's cattle have been pastured on such lands for twenty or thirty years.
2. Judgment in this case reversed, but if the plaintiff will remit \$114 00 from the verdict and judgment thereon, and dismiss his action as to the defendants, William Davis, Dine Davis, and William Morgan, the judgment shall stand affirmed for the balance of the verdict against the defendant, Charles Davis.

**Common of pasturage. Trespass. Before Judge KNIGHT.
Union Superior Court. October Term, 1873.**

James Gurley brought trespass against Charles Davis, William Davis, Dine Davis and William Morgan, for \$5,000 00 damages, sustained by reason of the erection of a fence by the defendants, which excluded the stock of the plaintiff from pasturing upon unimproved lands, upon which he claimed a prescriptive right of common of pasturage on account of thirty years continuous and uninterrupted use of said land for such purpose. The second count alleged damages on account of the killing of certain stock of the plaintiff.

The defendants pleaded the general issue.

The evidence showed that Charles Davis built a fence five or six miles long, from Tocoo river to the mountains, on lands which he claimed, excluding the stock of the plaintiff from

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his side of the fence; that plaintiff had pastured his stock upon the land for some fifteen or twenty years; that his stock had been killed to the amount of about \$80 00; that the right of pasturage was worth some \$50 00 per annum.

There was some testimony tending to show that Charles Davis killed the stock. The circumstances which were claimed to connect the other defendants with the alleged trespass were so slight that it is not deemed necessary to mention them.

The jury returned a verdict for the plaintiff for \$200 00. A motion was made for a new trial, because the verdict was contrary to law and the evidence. The motion was overruled, and defendants excepted.

This case was before the Supreme Court at a previous term: See 44 *Georgia Reports*, 582.

C. J. WELLBORN; MARSHALL L. SMITH, by THOMAS F. GREER, for plaintiffs in error.

WIER BOYD, for defendant.

TRIPPE, Judge.

1. Damages were given as specially stated in the verdict, both for a trespass upon the right of common of pasture claimed by the plaintiff, as well as for the killing of plaintiff's cattle. This case was before this court, as reported in 44 *Georgia*, 582, when it was held that the plaintiff had not shown any right to the common of pasture, for the interference with which his action is partly brought. He has not strengthened his claim on this point, and we affirm the former decision as to this question. We have been urged to decide whether common of pasture exists in Georgia, and to declare the law in reference thereto. The invitation cannot be accepted, only so far as to pass on the case before us. We have neither time or inclination to volunteer to glean in the fields of almost forgotten lore upon an almost obsolete question—the more especially as no aid has been rendered us by reference to a single authority. Chancellor Kent says, "the change of manners and property, and the condition of society in the country, is

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so great that the whole of this law of commonage is descending fast into oblivion, together with the memory of all the talent and learning which were bestowed upon it by the ancient lawyers." We do not say that such a right cannot or does not exist in this state. Doubtless it could be created by grant. But we have no hesitation in pronouncing that the simple fact that a man's cattle has pastured on wild lands, such as they are in this case, for any length of time, does not establish the right.

2. The verdict was for "\$200 00 for killing the cattle and depriving stock from the range." The cattle killed were proved to be worth \$86 00. No damages could have been legally given for a disturbance of any right of pasturage. The verdict was a general verdict for plaintiff and against all the defendants. There is no evidence in the record to justify the finding, as to killing the cattle, against any of the defendants except Charles Davis—nothing connecting the other three defendants with the killing, either by acts or threats. Matthews is not a party, as was stated in the argument. Two verdicts have been rendered, and this is the second time the case has been brought here for review. In our opinion the verdict can be sustained against Charles Davis only by the evidence, and that only to the extent of damages for killing the cattle. Under the authority given to this court in section 4284 of the Code, we reverse the judgment of the court below, and order a new trial, unless the plaintiff will remit from his judgment the sum of \$114 00, and dismiss the suit as to William Davis, Dine Davis and William Morgan.

SIMONTON, JONES & HATCHER, plaintiffs in error, vs. THE LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY, defendant in error.

1. By the provisions of section 2794 of our Code, contracts of insurance must be in writing, and a subsequent agreement to alter such a contract must also be in writing.

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2. Where the law requires a contract to be in writing, equity will grant relief, if the party complaining has so acted on the parol contract as that it would be a fraud upon him to permit the other to deny the contract. But in such cases, the act must be in *pursuance* of the contract, *on the faith of it, and induced by it.*
3. When one had a policy of insurance on a stock of goods in a certain house, and undertook to remove the goods to another house, and whilst actually engaged in such removal was asked (as is alleged) by the agent of the company if he desired his policy transferred. The insured replied, by all means, if necessary, and the agent consented to the removal, and promised to make the necessary entry on the books. The insured, thereupon, continued the removal, took out no new insurance, and his goods were subsequently lost by fire:

Held, that this was not such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing.

Insurance. Equity. Estoppel. Before Judge HOPKINS.
Fulton Superior Court. October Term, 1873.

Simonton, Jones & Hatcher brought suit against the Liverpool, London and Globe Insurance Company, alleging substantially as follows :

On January 17th, 1872; plaintiffs paid to Walker & Boyd, the agents of the defendant, \$40 00 premium, in consideration of which said agents subsequently delivered to them a policy of insurance made by said defendant, dated on the 20th of the month aforesaid, whereby said defendant insured plaintiffs against all loss or damage by fire, to the amount of \$2,000 00, for the period of one year from the date first aforesaid, on their stock of tobacco, cigars, etc., contained in the two-story tin roof store, situate on the west side of Peachtree street, between the railroad and Marietta street, in the city of Atlanta. On November 25th, 1872, said insured property was destroyed by fire, in plaintiffs' factory on Ivey street, in said city. The property burned was of the value of \$40,000. The defendant, upon presentation of said policy, refused to pay the amount called for therein, because its agents were unable to find on their books, or on said policy, any note or entry in writing of the removal of said insured property to plaintiffs' factory. Plaintiffs aver that the defendant cannot refuse

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to pay said loss on this ground, for the reason that while they were engaged in removing said stock of tobacco, etc., from said store to said factory, J. S. Boyd, one of said agents, was at or near their said store, and plaintiffs informed him of said removal, and to what place. He inquired whether they desired said policy transferred to their new place of business. Plaintiffs stated that if said transfer was necessary, to make it by all means. Said agent replied that he would attend to it, and would make the necessary transfer of said policy on their books.

From the day of said removal to the time of sail refusal to pay, plaintiffs believed that said transfer had been made. The office of said agents, at the time of said removal, was within fifty feet of said store, and in sight of the same. They were fully cognizant of said removal, and of all the facts attending the same. Over two months elapsed after the removal before the fire, and neither during that interval, nor at any other time, did said defendant or said agents make any objection to said removal. Plaintiffs therefore allege that said agents and said defendant, by their acquiescence and silence, waived all objections to such removal, and thereby approved and consented to the same, and are now consequently estopped from setting up such defense.

A count for damages and attorney's fees was attached.

The declaration was subsequently amended by the addition of a third count. No material change was made in the case already presented. It recited that said agents, in their actings and doings in connection with said removal, "acted within the scope of their authority as such insurance agents," and that relying upon the promise of said agents to make the necessary transfer of said policy, they failed to procure other insurance.

The defendant demurred to the declaration. The demurrer was sustained, and plaintiffs excepted.

MARGENIUS A. BELL, for plaintiffs in error.

1st. Was it competent for said agents verbally to consent to said removal: Code, secs. 2794, 3806; 41 Ga. R., 130;

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6 Vesey, Jr., 349; 8 Ga. R., 540, 1 Hen. Black., 254; 2 *Ibid.*, 577; 6 T. R., 710; 5 *Ibid.*, 695; 3 Anst., 770; 1 Ga. R., 12; 16 *Ibid.*, 410; 25 *Ibid.*, 87.

2d. Liability may exist on part of insurer without written contract: Code, section 2794; 4 Am. R., 716; 19 Howard, 318; Bouvier's Ins., 503; 8 Georgia Reports, 540; 13 Mass. R., 96.

3d. If the agents had made the transfer or entered the removal on their books, the policy would have been unquestionably valid: 3 Esp., 121; 1 T. R., 343; 7 Johns. R., 52; 1 Caines' R., 60; 8 Ga. R., 540.

4h. When the corporation has acted on the contract it will be presumed that everything necessary to be done has been done: 12 Q. B., 1011; 24 Barb., 375, 9 Cal., 453.

5h. Corporation is bound by the express or implied contracts of its agents or officers, made in the discharge of their official duties, though not authorized to make such contracts: 7 Cranch, 299; 5 Wheat., 326; 8 *Ibid.*, 338; 16 How., 529; 14 Peters, 19; 18 B. Mun., 41; 5 Blackf., 156; Story on Ag., i2; 8 Pick., 188.

6h. A corporation is bound by its silence: 23 How., 381; Code, sec. 2192; 10 Ga., 362; 13 *Ibid.*, 46; 14 *Ibid.*, 124; 39 *Ibid.*, 586.

7h. After receiving the premium the company cannot repudiate the act under which it was received: 51 Ill., 342; 5 Amer. R., 70; 41 Georgia Reports, 171, 694; Code, section 2204.

8th Admitting this to be a new contract, still, as it was within the scope and authority of the agents, the company was liable: 41 Ga. R., 693; Code, secs. 10, 2194; 6 Ga. R., 166; 7 *Ibid.*, 194; 16 *Ibid.*, 424.

JACKSON & CLARKE, for defendant.

1st. Insurance, to cover a stock of goods at a point to which it has been removed, must be evidenced in the same manner as an original contract: Spitzer vs. St. Marks Insurance Company, 6 Duer, 6; Boynton & Clinton vs. Essex Mutual In-

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surance Company, 16 Barbour, 258; Lycoming Insurance Company *vs.* Updegraff, 40 Penn., 312.

2d. A contract of insurance, under the law of Georgia, must be in writing: Code, sec. 2794; Spitzer *vs.* St. Marks Insurance Company, *supra*.

3d. "Contained in" not words of description, but of restriction of liability: Annapolis R. Company *vs.* Baltimore Fire Insurance Company, 3 Amer. R., 112.

4th. Notice of alienation, parol proof inadmissible to show: Loring *vs.* Man. Insurance Company, 8 Gray, 28.

5th. Knowledge of agent is not notice to him: Forbes *vs.* Agawam Insurance Company, 9 Cush., 473.

6th. The first declaration is upon a contract. The count added as an amendment is upon a *tort*. They cannot be joined: Code, sec. 3261.

McCAY, Judge.

1. Our Code requires, in express terms, that all contracts of insurance must be in writing: Code, (1873,) section 2794. At common law this was not so: Flanders on Insurance 63; and many of the expressions in the cases, and, indeed, many of the cases themselves, are to be considered in view of the fact that the common law did not require such contracts to be in writing. A written contract not required by law to be in writing might always be, subsequent to its making, altered or modified by a new parol contract based on a consideration. But if the law require the insurance contract to be written, it would seem to follow, as a matter of course, that any alteration of it must also be in writing, since at last every alteration is a new insurance contract, which, by the express terms of the statute, must be in writing: Lycoming Insurance Company *vs.* Updegraff, 40 Pennsylvania, 312; 16 Barbour, 258.

2. The only ground upon which the plaintiffs can stand is that of performance on their part, or estoppel. Equity will not allow the statute of frauds to be used as an instrument of fraud, and will decree specific performance or hold the maker of a parol contract estopped from denying it when the

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other party, by virtue of it, and under and in pursuance of it, has so far acted as that it would be aiding in a fraud to permit the contract to be repudiated. And what equity would do, our courts of law, under proper allegations, will also do.

3. What then do the plaintiffs allege: That having a policy of insurance on their stock of goods in a certain house on a certain street in Atlanta, they concluded to remove them to a different house in a different place in the city; that they had actually commenced moving, and while engaged in so doing, one of the defendant's agents, noticing, asked them what they were doing, and notified them that the removal would vitiate the policy, unless they desired it continued, and the company agreed to it; that they, the plaintiffs, said they certainly did desire it, and that the agent said the company would agree, and that he, the agent, would fix it upon the books accordingly. The plaintiffs then allege that, relying upon this, they removed the goods, took out no new policy, supposing they were duly insured at their new place; that their house took fire, their goods were lost, and that the company refuses to pay. Might not any man say this who trusted to a parol contract? What did the plaintiffs do but rely upon it. They would have removed their goods without the parol statement of the agent. They were in the act of removing them—had them partly removed—when it is charged to have been made. The most that they charge to have done, in pursuance of the parol agreement, is, that they failed to take out a new policy, trusting, as they did, that their old one had, by the parol agreement of the agent, been altered. It will be noticed that they paid no money. They simply trusted to the parol agreement and failed to take out another policy. Was this, in any sense, a part performance? Was this taking a new position by virtue of the contract, in fulfillment of *their part of it*, so as that it brings them within the rule we have spoken of? We think not.

Suppose I contract by parol for a man's land, and trusting to the contract he buys another's land. Suppose a man agree, by parol, to pay me the debt of another, and I make arrangements to use the money, and am damaged by my failure to

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get it? Neither of these is within the rule. The act done must be in *performance* of and in pursuance of the parol contract. The contract, it must be remembered, is void at law, and is only enforced because the courts of equity have, for the prevention of fraud, set up certain defined exceptions to the statute in which they will grant relief: See Code, 1951, 3187; Browne on Frauds, section 457; Roberts on Frauds, 138; Buckmaster *vs.* Harrop, 7 Vesey, 341. The case presented in this declaration comes within none of the rules laid down for relief. It is the simple case of a man, satisfied with a parol agreement, doing nothing, and every man who has made by parol a contract which, under the law, must be in writing, might defeat the statute in the same way by insisting that, relying on it, he had done, or failed to do, this or that. To make out a case, as we understand the law, the party seeking to set up a parol contract, which the law requires to be in writing, must show that he has done some act in performance of the contract upon his side, which act of performance has put him in a new position, so as that it would be a fraud upon him to permit the other party who has accepted this part performance to repudiate it. Browne on Frauds, section 457. We think, too, that there was very little in the language of the agreement to justify the confidence alleged in the declaration. The words are consistent with an understanding on his part that as the policy required, they should bring their policy to the office where the entry of agreement would be made. We think the plaintiff was very neglectful if he tells the truth of the matter in his writ. No prudent man, with a policy of insurance on goods in one house, would be content to risk them in another, with nothing but a statement, on the street from an agent, that the company would consent to the removal.

Judgment affirmed.

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DONALD MCPHEE, plaintiff in error, *vs.* GUTHRIE & COMPANY, defendants in error.

On January 24th, 1867, S. executed his mortgage deed upon a lot in the city of Atlanta to G., to secure the payment of a promissory note for \$2,822 50. The mortgage was foreclosed, and the execution issuing therefrom levied upon the property mortgaged. After the foreclosure, S. had said lot set apart to him as a homestead under the act of 1868, and, with the approval of the ordinary, as required by said act, sold the same to M. for \$1,750 00, the value of the lot. M., under the decisions of a majority of this Court, believing his title good, placed improvements on said lot to the value of \$2,500 00. He claimed the property, and filed an equitable plea, praying that he might be allowed the value of his improvements, the Supreme Court of the United States having declared the act of 1868 unconstitutional as against contracts existing before its date:

Held, that the entire property with improvements should be sold, and the value of the lot at the time of the sale to the claimant, with interest thereon, paid to the mortgagee *f. fa.*, and the balance to the claimant.

Mortgage. Claim. Equity. Improvements. Before E. N. BROYLES, Judge *pro hac vice*. Fulton Superior Court. April Term, 1873.

For the facts of this case, see the decision.

COLLIER, MYNATT & COLLIER, for plaintiff in error.

The court erred in sustaining demurrer to claimant's equitable plea. Claimant being an innocent purchaser, without notice, in good faith, having placed on the premises valuable permanent improvements, was entitled to payment therefor out of the proceeds of the sale of said property: Bright *vs.* Boyd, 1 Story's reports, 478; same case in 2 Story's reports, 605; Wormly *et al. vs.* Wormly *et al.*, 1 Brock, 331; same case in 8 Wheaton, 421. Plaintiff in *f. fa.* entitled to lien on the property as it existed at the time the mortgage was executed: Chisholm *vs.* Chittenden, 45 Ga., 213; 4 Kent, 68; Powell *et al. vs.* Morrison & Brimfield Manufacturing Co., 3 Mason reports, 347; 3 Parson on Cont., 222, 223.

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L. J. GARTRELL; JACKSON & CLARKE, for defendant.

Every material point involved in this case arises upon the equitable defense set up by the claimant. Did the court err in sustaining the demurrer to this equitable plea? The reply depends upon three leading propositions which may be stated as follows: 1st. Can a *bona fide* purchaser, without notice, claim compensation for the value of improvements made by him as against the true owner, where he is not sought to be made liable for *mesne* profits? 2d. Does a mortgagee stand in any different position from the true owner? 3d. Is the claimant, under the facts set up in his equitable defense, a *bona fide* purchaser without notice? 4th. Admitting claimant to be a *bona fide* purchaser, and admitting that such a purchaser would be entitled to compensation for improvements, does he make such a case by his equitable defense as would entitle him to a decree? To recur to the first proposition:

1st. Can a *bona fide* purchaser without notice, claim compensation for the value of improvements made by him as against the true owner, where he is not sought to be made liable for *mesne* profit? Sugden on Vendors, p. 1029, sec. 57; Green *vs.* Biddle, 8 Wheaton, 1. This case decides the following principles: 1st. Value of improvements allowed in favor of *bona fide* purchaser without notice, only against *mesne* profits. 2d. This privilege only allowed where the owner of the true title is the movant: Code, section 2855; 2 Story's Eq. Ju., section 799, (b) section 1238. This case comes within neither of the above classes. The value of the improvements is not sought out of the *mesne* profits, nor is the owner of the true title the movant.

2d. If, then, equity would not interfere in behalf of the purchaser as against the true owner, seeking to recover possession of his property, does not the case of a holder of a mortgage demanding his money and not the land, present stronger reasons against the intervention of equitable jurisdiction? Hughes *vs.* Edwards, 9 Wheaton, 489. Though the purchasers in this case are referred to as having constructive

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notice from the registry of the mortgage, yet, in fact, they honestly believed their title to be paramount. A mortgagee cannot be delayed by contest between different purchasers of mortgaged property as to proportion of liability: *Ibid.*; *Childs vs. Dolan*, 5 Allen, 319.

3d. Is the claimant, under the facts set up in his equitable defense, a *bona fide* purchaser without notice? If he is not, he has not even a pretext to sustain his equitable defense. We submit that every necessary attribute to make him the favorite child of a court of equity is wanting. He purchased the property in controversy not only whilst there was a mortgage on it of record, but whilst the execution issuing upon the foreclosure was levied thereon. The same day that the conveyance to the claimant was executed a quit-claim deed was made by Ball to Sells. He had notice from the registry, the *lis pendens*, and the levy. But it is replied that the supreme court of Georgia had held the homestead provision of the constitution of 1868 and the act of 1868, constitutional, and that, therefore, under these decisions he should be protected. In *Green vs. Biddle*, 8 Wheaton, 1, the purchasers bought and improved their lands under acts of Kentucky of 1797 and 1812, which were sustained by the supreme court of the state as constitutional, yet, upon the supreme court of the United States holding to the contrary, they lost their ameliorations. Under the decision in *Gunn vs. Barry*, 15 Wallace, this constitutional provision and act never had any vitality. In *Chapman vs. Akin*, 39 Georgia, 350, and in *Battle vs. Shivers*, 39 *Ibid.*, 415, 416, 417, 420, it is held that rights can never be acquired under an unconstitutional law. How similar is the case of *Henderson vs. Casey*, 11 Sergeant and Rawle, 10, to that presented by this equitable defense? The language of the court is nearly as strong as that of this court in *Battle vs. Shivers*. The present Chief Justice dissented from all of the decisions now appealed to for the protection of claimant.

WARNER, Chief Justice.

On the 24th day of January, 1867, Holmes Sells executed his mortgage deed to Guthrie & Company upon a city lot in the city of Atlanta, to secure the payment of a promissory note for the sum of \$2,822 50, bearing even date with said mortgage, and due sixty days after date. The mortgage was duly recorded, foreclosed and levied on the city lot described therein, and claimed by Donald McPhee. It appears from the evidence in the record that, subsequent to the execution of the mortgage, the city lot was assigned and set apart to Sells, the mortgagor, as a homestead, for the benefit of himself and family ; that afterwards, on the 19th of April, 1870, Sells and his wife, with the consent of the ordinary, conveyed the lot by deed to the claimant, for the consideration of \$1,750 00 paid by him. The claimant filed an equitable defense, in the nature of a bill in equity, in accordance with the practice of our courts under the provisions of the Code, in which he alleged, in substance, that the property had been set apart as a homestead for Sells and family, and that he purchased it in good faith, and paid therefor the aforesaid sum of \$1,750 00, believing that he was getting a good title to the same, and had no notice of any incumbrance on the land, or of anything that impugned or cast suspicion on the title to the same ; that being such innocent purchaser, he proceeded to improve said lot, and erected thereon a substantial brick store-house, at a cost of \$2,500 00, and to that extent the property has been increased in value ; that at the time he purchased the lot, it was not worth more than the sum he paid for it, but is now worth \$4,000 00. The claimant prays that if said property, on the trial of the claim case, shall be found subject to the plaintiffs' *fi. fa.*, he may have a decree that, upon the sale of the property, he be paid out of the proceeds thereof the said sum of \$2,500 00, the value of the improvements put on said property since he purchased it, and such other relief as the justice and equity of his case may require. The plaintiffs demurred generally to this equitable defense set up by the

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claimant, which demurrer was sustained by the court, and the claimant excepted. The case then proceeded to trial, and the jury, under the charge of the court, returned a verdict finding the property subject. A motion was made for a new trial, which was overruled, and the claimant excepted.

The main question in this case is involved in the demurrer to the claimant's equitable defense. The pleadings present a new and important question, growing out of the unconstitutional legislation of the state in relation to the granting of homesteads affecting past contracts. That the homestead assigned and set apart to Sells and his family is void, as against the plaintiffs' mortgage lien on the property covered by the mortgage, there is no doubt; but the question is, whether the improvements put on the property by the claimant, under the facts and circumstances as alleged, are subject to be sold in satisfaction of the plaintiffs' mortgage debt, and has a court of equity in this state jurisdiction to grant the relief prayed for in this case? The mortgagees had a vested right in their mortgage lien on the property covered by the mortgage to have it sold for the payment of their debt, and they could not be deprived of that right without just compensation, and the property vested in their debtor as his homestead; that would be practically taking one man's property and giving it to another. So, on the other hand, if the plaintiffs should be allowed to have the claimant's improvements put on the land after he had purchased it in good faith, sold and the proceeds thereof appropriated to the payment of their debt, that would also be taking the claimant's property and giving it to the plaintiffs. They never gave credit to Sells, their debtor, on the faith of the improvements put on the land by the claimant after he purchased it. It is neither equitable or just that the plaintiffs should be allowed to appropriate the value of the improvements put on the land by the claimant to the payment of their debt, when no credit was given to their debtor upon the faith thereof. What equitable claim have the plaintiffs to have their debt paid out of the value of the improvements put on the lot by the claimant after the date of their mort-

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gage, and after his purchase of it, under the circumstances as alleged by the claimant? But it is said that, admitting all that the claimant alleges to be true, still, a court of equity has no jurisdiction to grant the relief prayed for, because the plaintiffs, by their mortgage lien, were entitled, under the law, to have all of the land covered by the mortgage, as well that which is now on it as that which is under it, sold for the payment of their debt, including the improvements.

It will be noticed, however, that under our law the plaintiffs, as mortgagees, have no title to the mortgaged property. A mortgage in this state is only a security for a debt, and passes no title: Code, 1954. But is it true that if the plaintiffs had the legal title to the lot of land, and were seeking to recover the possession of it from the claimant by a suit at law, under the facts of this case, that he could not set off the value of his improvements against their claim for the *mesne* profits of the land? The 2906th section of the Code declares, that against a claim for *mesne* profits, the value of improvements made by one *bona fide* in possession under a claim of right, is a proper subject matter of set off. It is also provided by the 3468th section of the Code, that a trespasser cannot set off improvements in an action brought for *mesne* profits, except where the value of the premises has been increased by the repairs or improvements which have been made. In that case the jury may take into consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. It is true, the plaintiffs are not seeking to recover *mesne* profits for the use of the land, but they are seeking to subject the improvements put on the land by the claimant, to the payment of their mortgage debt, and these sections of the Code are cited for the purpose of showing what is the declared policy of our law in regard to improvements made on land as against the claim of one who has the legal title to it, even as against a *trespasser*.

The equitable right of a trespasser to be allowed the value of his improvements made on the land where the value of the

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premises has been increased thereby, is clearly recognized by our law, as well as where improvements have been made by one acting in good faith under a claim of right, as in this case. But this is not a new principle introduced into our Code; it was a principle recognized by courts of equity in England long anterior to 1776. In looking into Viner's Abridgement, (volume XVIII., new edition, 124,) we find two cases reported in which purchasers were allowed compensation for improvements, one of which was made without notice of any incumbrance, the other with notice. In the case of Peterson *vs.* Hickman, "the husband made a lease of the wife's land to one who was ignorant of the defeasible title; the lessee built upon the land, and was at great charge thereon. The husband died, and the wife avoided the lease of the land, but was compelled, in equity, to yield a recompense for the building and bettering of the land, for it was so much the better worth unto her." In Wally *vs.* Whaley, "A purchaser who, before his purchase money paid, or deeds executed, (though not before his contract made,) had notice of a prior settlement, was ordered to be allowed what he had laid out in lasting improvements upon the tenements, though made pending the suit." Equity, as defined by Grotius, and recognized by Blackstone, is the correction of that wherein the law, by reason of its universality, is deficient. Equity jurisdiction is established and allowed in this state for the protection and relief of parties, where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong, or relieving for injuries done: Code, 3081. It is true, as a general rule, that equity follows the law, that is to say, a court of equity would be as much bound by a positive statute of the state as a court of law would be. In the language of our Code, equity is ancillary, not antagonistic, to the law, hence, equity follows the law where the rule of law is applicable, and the analogy of the law, where no rule is directly applicable: Code, 3083. Now, there is no rule of law, of which we are advised, directly applicable to the claimant's claim to be paid for the value of

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his improvements put on the land, under the facts of this case, and therefore we must follow the *analogy* of the law in protecting his unquestioned equitable rights.

We have already shown, by the sections of the Code before cited, what is the policy of the law as to making compensation for improvements made on land in a suit by the party having the legal title, when such improvements have increased the value of the premises, even in the case of a trespasser. The claimant in this case was not a trespasser. He purchased the lot in good faith, and went into the possession of it under *color* of law and claim of right. He was not a mere *wrong-doer* in taking possession of the lot and putting the improvements thereon, and it would seem that the plaintiffs should be contented with making him lose the original purchase money paid for the lot, by the sale of it for their benefit, without seeking to take from him the value of his improvements, and have the same appropriated to the payment of their debt, to which they have no just or equitable claim. But we entertain no doubt as to the jurisdiction of a court of equity in this state to protect the claimant as to the value of his improvements, on the statement of facts disclosed in the record, and the court below erred in sustaining the demurrer to the claimant's equitable defense. The law, by reason of its universality, is deficient to reach the justice and equity of this case, in view of its peculiar circumstances.

In our judgment, the court below should decree a sale of the mortgaged property, and that the plaintiffs in the mortgage *fi. fa.* be first paid the proven value of the property covered by the mortgage at the time of the purchase of the same by the claimant, exclusive of the claimant's improvements, with interest on that proven value from the date of such purchase up to the day of sale, and that the claimant be allowed to receive out of the proceeds of said sale the proven value of his substantial improvements put on the lot, provided the property shall sell for enough to pay both; but if not, the plaintiffs to be first paid the proven value of the property covered by the mortgage at the date of the purchase afore-

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said, exclusive of the improvements, with interest as before stated.

Let the judgment of the court below be reversed.

EARLY W. THRASHER, plaintiff in error, *vs.* BARTON H. OVERBY *et al.*, defendants in error.

1. When a bill was filed to enforce an award, and the defendant set up that the award was the result of a mistake on the part of the arbitrators, setting out in his answer the evidence introduced at the hearing, and the plaintiff replied that there was other evidence before the arbitrators:

Held, that whether such evidence was in fact before the arbitrators, was a question of fact for the jury.

2. If, upon an examination of a brief of the evidence upon which an award is founded, and upon a hearing of the testimony of the arbitrators, it appears that the award is founded upon a mistake upon a material point, as that a certain item of an account has been twice charged against one of the parties, the award should be set aside and the jury proceed to decree as to the real rights of the parties.

Award. Evidence. Jury. Practice in the Superior Court. Before Judge BARTLETT. Morgan Superior Court. September Adjourned Term, 1873.

This is the second time this case has been before the supreme court: See 47 *Georgia Reports*, 10.

Barton H. and Nicholas Overby filed their bill against Early W. Thrasher for the specific performance of an award, alleged to have been rendered upon an arbitration between them. The defendant pleaded, as objections to the decree prayed for, that the award was contrary to the evidence, fraud in one of the arbitrators, and mistake in all, setting forth what he claimed to be was all the evidence produced. Upon reading this testimony, he moved the court to set aside the award, upon the ground that it was contrary to the evidence. Complainants insisted that there were two pieces of documentary evidence before the arbitrators not set forth in defendant's

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brief of the testimony. This the defendant denied. The court caused evidence to be introduced before it upon this point, and held with the complainants. The defendant then amended his plea by alleging that such documentary evidence was before said arbitrators without his knowledge or consent, and prayed that the award might be set aside on that ground. The court held that this presented a question which it alone could determine, and refused to allow the issue to be submitted to a jury. This branch of the case was also decided against defendant.

The jury found for the complainants. The defendant moved for a new trial upon several grounds, and amongst them, because the court erred in refusing to submit the question as to said documentary evidence having been before the arbitrators, to the jury, and because the verdict was contrary to the evidence. The motion was overruled, and defendant excepted.

For the remaining facts, see the opinion.

THRASHER & THRASHER; BILLUPS & BROBSTON, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

McCAY, Judge.

1. When a submission and an award, and the evidence on which the award was made, are before a court, it is simply a question of law whether the award is or is not legal. But if there be a dispute as to what was the proof, it is obviously a question of fact to determine which is right. We think, therefore, the judge, in this case, should have left it to the jury to determine what was the truth as to this dispute of fact, provided that, in the judgment of the judge, it was material. When the case was before the jury the duty of the jury was to inquire, was the evidence before the arbitrators or not? If so, ought the award to stand or not? If not, what, according to the evidence, is the true right of the parties?

2. So far as we have been able to get at the truth of this

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case, from the record, we are clear there has been some mistake in this award. Mr. Foster and Judge Reese both say the Winship memoranda were used as evidence. Judge Reese says, as the basis of a general account, and Mr. Foster says the amount received from Winship did not appear in the defendant's returns. Now, if this be so, it is plain that this whole amount received from Winship was charged twice against the defendant, for it is very apparent that he *did* return to the ordinary the several sums he got from Winship. He returned each ward's share, in his return for that ward, which was proper, whilst the Winship memoranda has it together. It is strange that men generally so accurate and observant as these intelligent lawyers, should have made so gross a mistake, but unless the record is grossly deficient or false, as we have it, it seems to us incontestible that this mistake must have taken place. If no allowance at all is made to the guardian for any of his investments, the amount found (if this double charge is left out) is too large. The most of the money was Confederate currency, and he has paid the wards considerable sums, since the war, in Federal currency. Whilst we would carefully watch to prevent guardians from wasting the estates of the wards, and hold them to a strict account, yet we must always keep right and justice in our mind.

As this record presents this case we think, if this evidence was before the arbitrators and they acted upon it, they have made a mistake. They have charged Thrasher twice with the amount received from Winship.

Judgment reversed.

WILLIAM U. GARRARD, executor, plaintiff in error, vs.
CHARLES J. MOFFETT, defendant in error.

Where money is brought into court under an execution issued upon a judgment against a garnishee, the oldest judgment against the defendant takes the fund.

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Garnishment. Judgments. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

For the facts of this case, see the decision.

PEABODY & BRANNON; LOUIS F. GARRARD, for plaintiff in error.

BLANDFORD & CRAWFORD, for defendant.

WARNER, Chief Justice.

Moffett ruled Mahaffy, as constable, to show cause why he should not pay over to him the amount of money in his hands, collected on two executions issued in his favor against Saulsbury. The constable showed for cause that the executions were obtained against Saulsbury, as garnishee of J. T. Thweatt, and that Garrard, executor, etc., had placed in his hands an execution against J. T. and R. R. Thweatt, issued on a judgment of older date than the judgments obtained against Saulsbury, the garnishee of J. T. Thweatt. Garrard, executor, was made a party to the proceeding before the superior court. The court decided that the money in the constable's hands should be paid to the executions issued on the garnishment judgments against Saulsbury, and not to the execution in favor of Garrard, issued on the common law judgment of older date against the Thweatts, to which decision Garrard excepted.

In our judgment, this decision of the court was error: Code, section 3545; *Shorter vs. Wimble & Company*, 41 *Georgia Reports*, 691.

Let the judgment of the court below be reversed.

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THE LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY, plaintiff in error, *vs.* J. H. & W. CREIGHTON, defendants in error.

1. An indorsement, amongst others, on a fire insurance policy, stating that in case of a difference of opinion as to the amount of loss or damage, such difference shall be submitted to arbitration, (although such indorsements are referred to in the body of the policy,) does not bar the insured of his right of action without such submission, unless the same is stipulated to be a condition precedent to his right to resort to the courts, or as the only mode by which the loss or damage is to be ascertained, or by which the liability of the company can be fixed.
2. But if one of the conditions so indorsed and referred to, be that the insurer is not liable for loss or damage by theft, at or after any fire, such stipulation is binding on the insured.
3. The evidence does not show that the goods and the store in which they were placed, were so taken possession and control of by the company or its authority, as to make it liable for the theft which is charged to have been committed.
4. Under the evidence, it was no abuse of discretion by the court in refusing a new trial on the ground that the goods were removed from the house in which they were kept without any necessity therefor.
5. Judgment is reversed and a new trial granted, with the privilege to defendants in error to write from the verdict and judgment the sum of \$2,261 60, and upon the same being done, the judgment for the remainder shall stand affirmed.

Insurance. Conditions. Before Judge SCHLEY. Chatham Superior Court. January Term, 1873.

J. H. & W. Creighton instituted suit against the Liverpool, London and Globe Insurance Company on two policies of insurance, one for \$10,000 00, and the other for \$5,000 00, claiming as due them for damage by fire, and from said defendant's having taken possession of the insured property at said fire, and having failed to return the same, \$7,131 76, besides interest.

The defendant pleaded as follows:

1st. That said contracts of insurance were made subject to certain conditions and stipulations indorsed on each of said policies, one of which was, "that in case of difference of opinion as to the amount of loss or damage, such difference

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shall be submitted to the judgment of two disinterested and competent men, and mutually chosen, (who, in case of disagreement, shall select a third,) whose award shall be conclusive and binding upon both parties." That subsequent to the alleged loss, to-wit: on March 13th, 1871, there being a difference of opinion between the plaintiffs and the defendant as to the amount of the loss, the defendant offered to comply with said condition, and requested the plaintiffs so to do, which they refused.

2d. That the plaintiffs only suffered a loss by fire to the amount of \$1,099 14, which the defendant has always been ready and willing to pay.

The following evidence was introduced for the plaintiffs:

1st. J. H. CREIGHTON, sworn: Witness is one of the plaintiffs. Kept a store at 174 Bay street, when the fire occurred in that block, February 27th, 1871. The day after the fire, found the key of the store in the possession of J. E. Johnston & Company, agents of the defendant. Witness could not get into the store until they opened it and let him in. Found goods in the store in dreadful condition. An estimate of loss was then made under agreement with Mr. Mims, one of the firm of J. E. Johnston & Company; he proposed that the goods should be arranged for examination by our clerks and others that he might send, at the expense of his office; this was done and paid for by him; a large amount of goods was found to be missing. An inventory of goods saved was taken, which amounted to \$10,953 62. Foreign imported goods and domestic goods were kept separate on the books, because the Savannah house was allowed a *bonus* on foreign goods of twenty-five per cent., and this was therefore added to the invoice price in estimating the value of goods in store. The amount of goods in store before the fire, as appeared by the books, was \$15,493 29; had received \$37,804 61 in all up to the time of the fire; had sold \$25,711 91; then deduct \$18,000 00 and \$4,539 00 would be the amount of goods missing. The damage to the goods saved was about

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fifty per cent., though we did not claim that amount; we claimed twenty-five per cent., equal to \$2,738 40; after the statement had been made out it was found that a further deduction \$140 31 should be made from the amount claimed on account of goods sold which did not appear on the books; the defendant offered to pay in full settlement about \$2,500 00. When I found there was no prospect of a satisfactory settlement, I made out a sworn statement and left it at the office of the agents of the defendant; there was no dispute about the quality of goods in the store after the fire. The foreign goods kept by plaintiffs were of the best quality; domestic goods were such as are commonly found in Savannah. The invoice book and journal of plaintiffs presented to witness and identified by him.

Cross-examined: Hugh Creighton, one of the original firm, died in the fall of 1871; at the time of the fire my residence was seven miles from Savannah, where I went every night. Neither of the partners resided in the city; I heard of the fire next morning from Dixon, who went out to inform me, and I returned with him; I had to go to the office of the agents of the company to get the key of the store; I saw the key that morning, for the first time after the fire, in the hands of a man in their employ; I staid until one or two o'clock; they had commenced to put the goods in order: Dixon, Wilson and Catherwood were employed by the defendant to assist in putting the goods in order; don't know who else the defendant employed; never went back to the store until the goods were arranged; was absent from the city several days; Dixon came out to let me know when the work was done; some of the goods were received from the police barracks that had been captured when stolen; the goods found in the store had been damaged in carrying them out in the streets. None were burned and none wet, but they were dirty, trampled on and tossed about; the store was not burned. The defendant offered arbitration about damage—before inventory taken they agreed to pay for lost goods; after all the goods were fixed up, and it was found that the missing would amount to \$4,000 or more, they declined to pay.

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2d. JOHN Y. DIXON sworn: The fire occurred about eleven o'clock at night; I went promptly to it; our store was the sixth or seventh from that on fire; almost an entire block between; the fire finally extended to the store next to ours; I was clerk, salesman, general manager, etc., for plaintiffs; I opened the store, saw Daniels, clerk of the insurance agents, come in great haste; he said, "the company has a risk of \$15,000 00; is Creighton about?" I asked him if he represented the agents, and he said yes, and asked what I thought about it; he then said these goods ought to be removed; I replied that I would agree to any thing he said; that I would be subject to his orders; the store was then opened, and he went in and took charge; I went in, also, at the same time; several others went in, and in a few minutes they commenced to move the goods; a good many volunteered to help move them; I helped myself, and sent Wilson and Catherwood to help; almost all the goods were removed. On receipt of a message, through an officer of police, said to be from General Johnston, one of the agents of the defendant, the doors were closed and the moving of goods stopped; some of the goods moved were put in a pile in front of the store by a tree, but there were many exceptions to the rule; I saw Mims the next day; I did not have control of the keys again for nearly two weeks; believe McNulty had the keys from the time he was employed to assist in making inventory; two or three parties were employed by Mims to fix up goods; Mims paid expenses of all this; Mims was one of the firm of J. E. Johnston & Company, defendant's agents. Foreign goods had a *bonus* in our favor of twenty-five per cent.; the defendant required the inventory to be taken to ascertain what goods were missing; inventory was of goods returned to the store; loss was ascertained by reference to the books, invoices, sales, etc.; books remained at the agents' office as long as they wanted them; inventory took from four to five days; those of us engaged in taking inventory had possession of store while it was going on; McNulty had the keys. On the morning before the fire, books showed goods

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on hand \$15,493 29; after inventory taken, \$10,953 62—amount of missing goods, therefore, \$4,539 67; damage to goods saved, in my opinion, was twenty-five per cent., equal to \$2,738 40; the damage was caused by rough handling, trampling, dirt, etc.; many pieces were unrolled; Daniels had goods removed because he thought the whole block would be burnt; goods recovered from police barracks were put back into store. I have been in the dry goods business over eight years; while taking inventory, I frequently missed goods that I knew were in store at the time of the fire.

Cross-examined: I was not present when goods were returned to the store; I did not object to the removal of goods; the pile of goods was around a tree in front of the store; I was in the store and at the door while the removal was going on; saw goods carried from the store, but don't know where they went to; a one-horse wagon load of common goods, not very valuable, that the police had captured, was recovered from the police barracks; these goods were included in the inventory taken after the fire. I made no demand for the key; the first day that McNulty was at the store with me, when we were about to leave for dinner, I took the key out of the door; he at once asked me for it, and I gave it to him; there were two keys and two locks, however; McNulty had one and I one; neither of us could get into the store without the other. I was employed by Mr. Mims in assisting in taking the inventory; he said to Creighton, in my presence, "If your clerks will assist, I will pay the expense;" inventory was made at the joint expense of Creighton & Company and the defendant.

3d. T. B. CATHERWOOD, sworn: I was present at the fire; with my brother, who was in the employ of plaintiffs; found went Dixon, Wilson and others there. A gentleman stepped up, professing to represent the defendant, and inquired for Creighton; I told him he was not there, but pointed him to Dixon, who represented the house; he asked Dixon if the goods ought not to be removed, who replied, "That is as you say;" this



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person then further said, "Then I say move;" the moving then began, and I helped for awhile. I went into the back room, where there was no light, and it was thronged with people; I saw goods thrown out of the back window, and went into the front room and told Mr. Daniels about it, and asked him if he was in charge of the store; he said he was; I said to him, you had better then go into the back room and see what was going on there; I told him I thought it was wholesale robbery, and that the defendant would have a sweet bill to pay; Daniels rushed at once into the back room to stop it, but as I did not go back there again, I saw no more of him. The goods that were carried out were thrown in a pile at the foot of a tree; I afterwards bought some damaged goods, some socks, from the plaintiffs at a reduction of thirty-three and a third per cent.

Cross-examined: When I arrived, Dixon was in a quandary; said if he moved the goods, he might affect his insurance, and if he did not move them and they should burn up, they might lose the insurance; just while we were talking about it, Daniels came up, when the conversation between him and Dixon took place. Don't know who the people in the back room were; Daniels rushed in there as soon as I told him about the goods being thrown out of the window.

4th. JOHN A. FEUGER, sworn: I was present at the fire; saw them removing goods from a store; asked if assistance was needed; being answered yes, I helped to move some boxes to a tree some distance in front of the store; I went away for a time, and then came back after awhile; many of the goods were tumbled in the mud and sand near the tree.

5th. The policies of insurance, in the usual form, were introduced. Each policy stated upon its face that the insurance was "subject to the conditions and stipulations indorsed hereon, which constitute the basis of this insurance." Among the conditions referred to, were the following:

"That this company will not be answerable for any loss or damage to stock or goods whilst undergoing any process in

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which the application of fire heat is necessary—nor for loss or damage to goods in store windows occasioned by the lights in said windows—nor for loss or damage by explosion unless fire ensues, and then for the loss or damage by such fire only—nor for loss or damage resulting from neglect to use all possible efforts to save the property when on fire or exposed thereto, or after such fire—nor for loss or damage by theft at or after any fire.

"That in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men, mutually chosen, (who in case of disagreement shall select a third,) whose award shall be conclusive and binding on both parties."

The defendant introduced evidence as follows:

1st. L. MIMS, sworn: I am one of the firm of J. E. Johnston & Company; remember the fire of 22d February, 1871; did not hear the alarm during the night, and only learned it next morning about nine o'clock when I reached my office; Creighton came there nearly about the same time; he proposed to abandon the goods to the insurers; I positively refused this, and said that we wanted the loss properly adjusted; I went with him at once to the store to ascertain the condition of things; understood him to agree that the usual steps should be taken to fix the amount of the damage. I did not care who was employed to put the goods in order; suggested his own clerks if they were willing to serve. I disclaimed any intention to take possession of the store or the key; he persistently pressed it upon me, and I as persistently declined; was of course interested that the proper direction should be given to this business. As soon as the goods were put in order I wanted the damage ascertained; he immediately claimed for stolen goods; I repudiated any such claim; at Creighton's suggestion, inventory was taken. I denied all legal liability for goods lost, but agreed to pay one-half of the expenses of taking the inventory in order to ascertain the condition of things;

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never gave any orders to McNulty about the key, and never had any exclusive possession of it; never made any agreement to settle by the inventory. The books were brought to us, but they did not supply the facts we needed; the invoices seemed to be made from this firm to itself. I knew nothing about the per cent. of profits, nor about the *bonus* on foreign goods; I offered to settle by McNulty's return of damage done, and though I always disclaimed any other legal liability, I was willing and offered to pay \$2,500 00 by way of compromise to settle the whole matter; I also offered to submit the entire question of damage and loss to arbitration, as provided in the policy; this the plaintiffs declined.

(Here Creighton's letter of March 13th, 1871, was produced and read.)

“INVERNA, 13th March, 1871.

“Messrs. J. E. JOHNSTON & COMPANY:

“Dear Sirs: I am rather surprised to learn to-day that you have declined to make my firm a proposition looking to a settlement of their claim, which Major Mims intimated to me on Saturday would be made. I beg to state distinctly that there can be no arbitration, except in a legal way, in the claim for goods lost and stolen while in your possession; as for the damage sustained by removal, I am satisfied no retail stock of dry goods in Savannah, or, indeed, any other city, could be handled as our stock was and not suffer damage to the extent of twenty-five per cent. at least; but it is now too late to arbitrate on this point, as our stock has been put in order, and a considerable amount of new goods added; aside from this, my former experience is sufficient to prevent me from submitting anything to private arbitration if I can possibly avoid it. I see nothing to prevent this question of damage being settled without troubling outside parties; my partner in Philadelphia and I have decided on the course we will pursue, and it remains for you to say whether we shall be met in the spirit in which it is manifestly the interest of insurance companies to meet their customers, or not. I remain, yours truly,

“JAMES CREIGHTON.”

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Arbitration was proposed very soon after the inventory was completed; I did not agree to the inventory and appraisement, except for the purpose of procuring information for both parties. The key was in the office on the morning after the fire when I arrived there, brought by Mr. Daniels at the end of his work; but I expressly disclaimed any intention or right to control the key; don't think I ever saw it after that morning. Never acknowledged any legal liability, but offered to pay a sum by way of compromise, and for the sake of peace.

Cross-examined: Daniels was in the employ of Joseph E. Johnston & Company. Soon after the inventory was taken, I offered arbitration; Mr. Creighton declined; made the offer verbally, and also in writing; don't remember the precise date of it. When Creighton came there, key was in our office; don't know positively that Creighton used the word abandon, but his proposition amounted to that. My first object was to ascertain what we were bound for—the extent of the damage from removal; denied every other liability, but expressed readiness to arbitrate as to all matters between us under the policy; had several conversations with Creighton, who readily agreed to the steps taken; we acknowledged liability for the removal, and wanted to pay that as soon as it could be ascertained, but always denied liability for losses by theft; the object of the inventory was to obtain data by which to adjust the settlement, but never agreed that McNulty's estimate, or any other estimate, should be conclusive; don't remember with certainty whether the formal proposition to arbitrate was made by letter; it was certainly made orally, and there was correspondence also about it.

2d. W. H. DANIELS, sworn: In 1871, was policy clerk for Johnston & Company; had nothing to do with their business at fires. Remember fire in February, 1871; went to it about eleven o'clock at night; saw it approaching Creighton's store; thought it would reach it, as everybody else then seemed to do; saw Dixon at the store door, who was afraid that fire would reach the store; I thought the goods should be moved,

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and Dixon agreed with me ; he opened the door and we went in ; there was soon a great rush, and a good many others went in ; the goods were carried to a distance about twice the width of the court-room and placed on the ground ; Mr. Evertsen and one of the express company helped to watch the goods ; most of the time Evertsen stood near the pile, and the express man half way between the store and pile ; double line was formed from store to pile, goods passing between the two lines ; remember that one man broke through the line with goods, and there was a cry and pursuit ; believe he was captured, but don't remember precisely ; I stood most of the time where I could watch the whole operation ; afterwards I changed places with Evertsen ; remember to have heard that an order had come to stop the removal ; went back and saw Lieutenant Howard, of the police, who told me that removal was stopped ; when the excitement had fairly abated, had goods taken back into the store ; when the work was done, about daylight in the morning, I locked the door and carried the key away to the office of J. E. Johnston & Company, as there was no one present to whom I could properly deliver it. Not more than one-half of the goods had been moved out of the store ; back part of the store had considerable that was not touched at all, in bolts and boxes ; I was in position to see goods as they passed from door to pile ; did not remain inside, but at the door, which was kept closed ; no one was actually put in charge while removal was going on, but Evertsen was near the 'pile ; after goods were all removed, sergeant of police was put in charge ; don't remember to have seen Dixon towards the close of the fire ; there was no more carelessness in removal than is usual in such cases ; don't remember being told that goods were being thrown out of back window.

Cross-examined: What I did was intended for the good of the defendant, but I was not directly in the employ of the company ; I was only one of the clerks of J. E. Johnston & Company ; when I informed them what I had done they told me I had exceeded my powers ; I don't remember to have ever seen Mr. Catherwood until to-day ; I am the person who

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spoke to Dixon in front of the store about removal; removal continued for about three quarters of an hour; quite a number of persons engaged in it; most of the time I stood outside the door and Dixon inside the store; when the men got ready to come out with goods, Dixon opened the door and let them out; don't remember to have seen Dixon after removal stopped; before that time I had changed places with Evertsen.

Re-examined: From the stoppage of removal to the return of the goods I was there all the time; Evertsen was there too; I watched the door; Lieutenant Howard had ordered every one out of the store; I saw no one come out with goods; don't remember whether the door was kept shut or open at that time; don't remember when I got the key first.

3d. ALEXIS McNULTY, sworn: I was employed by Mims to take an inventory of goods and assist in ascertaining the damage. Dixon and I went through the goods, piece by piece, and decided in this way the extent of damage to the whole stock; some goods were not damaged at all, some slightly, some very much; amount of damage thus arrived at was \$1,099 14, which was a full and fair allowance—not a gross and lumping result or arbitrary percentage, but the actual damage arrived at by examining each piece; we made a schedule of the goods remaining on hand after the fire.

Cross-examined: We returned a statement of this, (which was here produced;) foreign and domestic goods in separate classes; the whole matter was agreed on between Dixon and myself; he and I agreed on the damage to each piece, in every instance, before it was put down on paper; we were paid by Mims to take the inventory; don't think Dixon and I ever failed in any one instance to come to the same conclusion about the damage; I know nothing about missing or stolen goods; every day when the store was closed I took the key to one lock and Dixon the other; neither of us could get in without the other.

4th. KILLOURY, sworn: I was sergeant of police, and present at the fire; from about half-past twelve o'clock to half-past

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three o'clock, guarded the goods in the pile taken from Creighton's store; no goods were stolen while I was there; was finally relieved by officer of the day, and a private watchman took my place; when I got there goods were all covered over with a canvass, or something of that sort.

5th. Deposition of EVERT C. EVERSEN, taken by commission, was here introduced and read: I was present at a large fire which occurred on Bay street, between Whitaker and Barnard streets, Savannah, Georgia, in the month of February, 1871; there was a store in said block of buildings with a sign over the door which bore the firm designation of J. H. & W. Creighton. I saw parties who had the keys of said store, who I believe to be agents of the plaintiffs, and said parties opened the doors of said store and did assist in removing the goods; I assisted in their removal and in guarding them afterwards; at the time of the removal of the goods there were present, among many others, W. C. Cosens, W. W. Carter, his son, John Carter, W. H. Daniel, and two men who I believe to be the agents of the plaintiffs; I lent my assistance at the instance of W. H. Daniel; I remained there long enough to witness, and did witness, the removal of all the goods that were removed; the said goods were turned over to the said W. H. Daniel; I was present when the removal of the goods back into the store was commenced; it was conducted under the supervision of the said W. H. Daniel, myself and some hired men. I was in a position, during the removal of the goods from the store to the street, in which the goods were under my eye from the time they left the door of the store until they were piled up in the street, and I could have easily detected any attempt to steal anything except very small articles which any one might have put in his pocket; I was not present during the whole time that the goods were guarded outside; I was not present when the goods were turned over to the plaintiffs or their agents; I do not know of any goods being lost; there were a good many packages of various kinds broken, owing to the hasty manner in which they

were handled, and which were more or less damaged and their contents more or less soiled ; I do not think that the damage done to the goods outside of the store would exceed \$500 00. A few moments after the removal of the goods from the store was commenced, I was on the outside of the store near the door, and with the assistance of W. W. Carter, W. C. Cosens and John Carter, and many other persons, formed a line from the doorway to the place where we had commenced to deposit the goods, by stretching a bolt of cotton cloth on either side from the doorway to the pile of goods, distant from forty-five to fifty feet from the door of the store, along which line, men who were engaged in removing the goods passed, and returned to the store ; at the pile of goods there were several persons watching them, and among them an expressman, Mr. Arthur Shaaff, and a colored boy who belonged to Joseph E. Johnston & Company's office, named Richard Henry ; before all the goods were removed, Lieutenant Howard, came and stopped the removal of the goods, and ordered every one out of the store ; then the store was locked up, I believe by the plaintiffs' agents, and a policeman was placed in charge of the goods in the street by Lieutenant Howard ; the expressman and one or two of the hired men remained with him, to assist in protecting the goods ; about this time, or shortly after, while Mr. Daniel and I were standing by the pile of goods, the agents of the plaintiffs handed the key over to Mr. Daniel, remarking that he had better remove them back into the store, so soon as he was satisfied that the fire was subdued ; Mr. Daniel and I were present at the pile of goods nearly all the time they remained in the street, with the exception of a few moments when we went to warm ourselves at the fire, as the weather was very cold, leaving the policeman and the parties already mentioned in charge of the goods ; as nearly as I can recollect, the goods remained in the street until about four o'clock in the morning, when Mr. Daniel and I, and the hired men began to put them back into the store, Mr. Daniel standing at the pile, and I in the doorway, and in the store, where I could see the pile

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of goods, receiving and directing the storage of the same, as the hired men brought them in on the hand cart; I omitted to state that while the goods were under the charge of the policeman and others aforesaid in the street, Mr. Daniel and I went across the street to procure some whiskey for the men; the removal of the goods back into the store was completed by daybreak, when the store was locked up by Mr. Daniel, and he and I left; there were very few in the street at the time the goods were being carried back into the store; when I went into the store, at the time they commenced to carry the goods back, I noticed a number of broken packages, and some of the goods lying on the floor, which were soiled by having been trodden upon. I was in the employ of defendant as extra clerk in the Savannah office, in July and August, 1870, and for a few days in January or February, 1872; the first time at \$4 50 per diem, and the second at \$4 00 per diem; I received no pay for my services at the fire.

6th. JOSEPH E. JOHNSTON, sworn: I remember the fire; I gave no instructions at all about removal or return of Creighton's goods; did not know that Creighton's store was even in that block. Knowing that there was a partition wall of brick, dividing the western half of the block from the eastern, where the fire was raging, I considered those near the extreme western end in no danger, and advised people generally there not to remove their goods, but assumed no authority whatever in the premises.

Cross-examined: I was on the roof of the building nearly two hours; knew nothing personally about Creighton, or that we he had such a policy on goods in that building; I simply called out to people near me not to remove the goods.

PLAINTIFF IN REBUTTAL.

CATHERWOOD, recalled. Witness reiterates statement about his telling Daniels of robbing in back room; identifies Daniels, and is quite certain that he is the person witness spoke to.

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DIXON, recalled. I never before heard of the estimates referred to by McNulty, of the amount of damage; he never consulted me when we were taking the inventory about the damage to different parcels of goods, except casually. I did not know that he was putting down the amount of damage opposite to each piece to be made use of afterwards; I did not in any way become responsible for the correctness of his figures, and was astonished at his statements on that subject on the stand.

JAMES T. WILSON, sworn: I knew about the fire; was one of Creighton's clerks. Mims employed me, with others, to assist in making inventory; I knew of no assessment made by McNulty and Dixon, jointly, nor of any understanding between them about value.

The testimony having closed, the court, among other things, charged the jury, that the facts disclosed in the plea of the defendant, founded on those conditions of the policies which provided for an arbitration in case of a difference of opinion as to the amount of loss or damage, did not constitute a defense to the action, and were not to be considered by the jury, and that, although the defendant, through its agents, may have offered to submit the question of the amount of loss or damage sustained to arbitration, in the manner pointed out in the policies, and such offer was refused by the plaintiffs, such refusal did not affect the plaintiffs' right to sue and recover before the amount should be thus ascertained by arbitration. And, further, that if they should find from the testimony that the plaintiffs had sustained damage, they should not include in such damage any amount of loss by theft at or after any fire, such losses being excluded by the conditions and stipulations referred to in the policies.

The jury returned a verdict for the plaintiffs for \$5,000 00, whereupon the defendant moved for a new trial upon the following grounds:

1st. Because the court erred in instructing the jury that the facts disclosed in the plea of the defendant, founded on those

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conditions of the policies which provided for an arbitration in case of a difference of opinion as to the amount of loss or damage, did not constitute a defense to the action, and were not to be considered by the jury.

2d. Because the court erred in charging that although the defendant, through its agents, may have offered to submit the question of the amount of loss or damage sustained to arbitration, in the manner pointed out in the policies, and such offer was refused by the plaintiffs, such refusal did not affect the plaintiffs' right to sue and recover before the amount should be thus ascertained by arbitration.

3d. Because the verdict of the jury was contrary to the evidence, the law, and the charge.

The motion was overruled, and defendants excepted.

JACKSON, LAWTON & BASINGER, for plaintiffs in error.

RUFUS E. LESTER, for defendants.

TRIPPE, Judge.

1. A stipulation in a policy of insurance providing that in case of difference of opinion as to the amount of loss or damage, there shall be a reference of the same to arbitration, does not bar the insured of his right of action without such reference, unless the stipulation amounts to a condition precedent to his right to resort to the courts, or makes such submission the only mode by which the amount of damage is to be ascertained, or by which the liability of the company can be fixed. Either of these two latter provisions would, at last, be equivalent to making the submission a condition to be performed before suit. In all the cases I have been able to find where the plaintiff was held bound by the stipulation, it was ruled that the terms of the policy were such as to make the reference a condition precedent to the right of the assured to maintain an action. In Scott vs. Avery, 5, House of Lord's cases, 811, the stipulation was "the sum to be paid * * * shall, in the first instance, be ascertained by the committee."

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It was there held that the terms of the policy made the ascertainment of the loss by the committee or by arbitration, a condition precedent to the right of action: See Elliott *vs.* R. E. Assurance Company, 2 Law reports, 237. The case of Millandon *vs.* Atlantic Insurance Company, 8 Louisiana reports, 557, referred to by counsel for plaintiff in error, does not show, as reported, what were the terms of the stipulation, whether or not they amounted to a condition precedent. The decision is generally, that "by the ninth condition of insurance, when the claim was made by the plaintiff for loss, if the defendant had offered to refer the question to arbitration, the plaintiff would have been bound to accept." No reason is given, no authority referred to, and no statement of what the ninth condition was. Flanders, on Fire Insurance, states the rule thus: "If the loss incurred by the assured is not paid, he may sue for the amount, notwithstanding a stipulation in the policy to refer all disputes to arbitration," page 576. He adds, on the ensuing page, "If the contract, however, is in such terms that a reference to a third person or to a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with. But if, on the other hand, the contract is to pay for the loss, with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference does not oust the jurisdiction of the courts, or deprive the party of his action." See May on Insurance, 593, 598, 606, 167; Digest of Insurance Decisions, by Littleton & Blatchley, (2d edition, by S. G. Clark,) pages 97 and 99; Roper *vs.* Lendon, 1 E & E., Q. B., 825. Phillips, in his work on Insurance, says, in a note to page 37, "the provisions for arbitration have little or no practical efficacy in marine insurance in Great Britain or the United States. The assured may bring a suit for a loss without offering a reference," and cites, 2 Story's Equity Jurisprudence, sections 1450, 1457; Kidd *vs.* Hollister, 1 Wil. 149; 8 T. R., 139; Robinson *vs.* Georges, 17 Maine, 131. I have examined several of these, and find

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they support the rule as laid down by Phillips. Baron Alderson said, in a case in 20 Law and Equity, 327, "the contract might have been framed so as to confine the decision of the committee (the referee) solely to the amount of loss, and that at the trial of any action neither party shall inquire into the amount of loss, and that the only question shall be the right to recover." Upon the whole view of the question, both upon principle and authority, we think the rule, as stated from Flanders, is correct, and that such stipulation must clearly show that it is a condition precedent before it can bar the assured of his action. Even then the action of the insurer might be such as to amount to a waiver or estop him from setting it up as a defense.

2. An express condition in the policy, that "the company shall not be answerable for loss or damage by theft at or after any fire," is binding on the insured. This was not controverted in the argument. It was not claimed that the insured was not bound by such a stipulation, or that, under it, the company were liable for loss by theft, but that, in this case, the agent of the insurers took charge of the goods and the house in which they were kept, during the fire and removed the goods, and that they were consequently responsible for the theft of the goods. And the jury must have included in their verdict a large amount for what was stolen; for the highest proven amount claimed for damage to the goods, caused by their removal from the store, was \$2,738 40. A much larger amount than that seems, under the evidence, to have been lost by theft. The verdict was for \$5,000 00, which certainly was increased to that sum by the testimony as to the stolen goods.

3, 4. We do not think the evidence shows that the store and goods were so taken into the possession and control of the company as to make it liable for the theft which is charged to have been committed. As the case may undergo a new trial, it is unnecessary, and might work prejudice to discuss the testimony on this point. The court charged the jury, that "if they should find that the plaintiffs had sustained

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damage, they should not include in such damage any amount of loss by theft at or after any fire, such losses being excluded by the conditions and stipulations referred to in the policy." The verdict could not have been given for as much as it was, without including at least a portion of the loss caused by theft. It is true that one of the plaintiffs states in his testimony that the damage to the goods saved was about fifty per cent. This would have made the verdict upwards of \$5,000; but the witness immediately adds, "though we did not claim that amount." The testimony of Daniels, the clerk and general manager of plaintiffs, and who aided in taking the inventory after the fire, puts the damage to the goods saved at twenty-five per cent.—\$2,738 40. One of the parties, who acted with Daniels in making out the inventory, puts the damage still lower. We think the court should have granted a new trial, or required the plaintiffs to have remitted from the verdict a sum which would have reduced it to that amount, to-wit: to the amount of \$2,738 40.

5. We accordingly direct that the judgment be reversed and a new trial granted, unless the plaintiffs below will write from the verdict and judgment the sum of \$2,261 60; and upon the same being done, the judgment for the remainder shall stand affirmed.

**BRANCH, SCOTT & COMPANY, plaintiffs in error, *vs.* ADAM,
SMITH & COMPANY, defendants in error.**

1. As a general rule, a creditor of one of the several partners cannot reach the interest of his debtor by a summons of garnishment upon one who is indebted to the firm; but when A, having a judgment against a partner, served a summons of garnishment against a bank, having money of the firm on deposit, and the firm filed a bond as claimants of the fund, as provided by the act of 1871, and thus made the partnership a party to the garnishment, the creditor may, under our law authorizing a court of law to give equitable relief, so shape a traverse of the garnishee's answer as to make an issue upon the interest of his debtor in the partnership, at the date of the judgment, or since, and

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appropriate to the payment of his judgment as much of the deposit in the hands of the garnishee as equals that interest.

2. In this case the objection to the summons of garnishment, on the ground that it is double, may be cured by amendment, the requirement in the summons that the garnishee shall answer what he owes the principal debtor, is the substance of the proceeding, and the addition requiring him to answer what he owes the firm is surplusage, and may be stricken out, if objected to.

Partnership. Garnishment. Practice in the Superior Court. Amendment. Before Judge GOULD. City Court of Augusta. August Term, 1873.

Branch, Scott & Company obtained judgment against Robert M. Adam, May 26, 1873. Upon the judgment garnishment process was sued out, July 10, 1873. On that day a summons, addressed to the Merchants' and Planters' National Bank, was served on the bank, requiring an answer as to indebtedness due Robert M. Adam, or the firm of Adam, Smith & Company, of which he is a member. On the 11th day of July, 1873, Adam, Smith & Company, by Robert M. Adam, filed in the clerk's office a bond, payable to Branch, Scott & Company, conditioned to pay the amount of the judgment in the event that the sum of \$411 47, in the hands of the garnishee, which is claimed by Adam, Smith & Company, should be held subject to the process of garnishment in said case, or should pay to the plaintiff the sum that may be found due to the defendant upon the trial of any issue that may be found upon the answer of the said garnishee, or that may be admitted to be due in said answer if untraversed.

No claim affidavit was filed with the bond, but the clerk issued a certificate to Adam, that Adam, Smith & Company had filed a bond to dissolve the garnishment of Branch, Scott & Company against the Merchants' and Planters' National Bank, thereby relieving the said bank from further liability.

This certificate was presented to the bank July 11, 1873, when they paid to Robert M. Adam, upon his drawing a check in the name of Adam, Smith & Company, \$411 47. On the same day the bank filed its answer, and after deny-

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ing all liability to Robert M. Adam, said, that at the time of the service of said summons of garnishment there was a deposit in said bank to the credit of Adam, Smith & Company, a firm composed of Robert M. Adam, Jewett D. Smith and Henry B. Byner, of the sum of \$411 47, which had that day been drawn out upon the check of Adam, Smith & Company, presented by Robert M. Adam, by whom the firm name was signed, he filing with the bank a certificate of the clerk of the city court of Augusta, that Adam, Smith & Company had filed a bond to dissolve the garnishment pursuant to the act of the General Assembly of December 14, 1871. This answer was made as required by said act to prevent a judgment by default against the bank, and to enable an issue to be tendered thereon between the plaintiffs and Adam, Smith & Company, to determine whether said money, or any part thereof, belonged to said Robert M. Adam ; the bank, by the filing of said bond and this answer, being relieved and discharged from all other liability in the premises.

On the 12th of July, 1873, a summons of garnishment was issued, addressed to Adam, Smith & Company, and served on Robert M. Adam, the officer returning that his copartners were non-residents of the state, and that he was the only person on whom it could be served.

On motion of Adam, Smith & Company, the garnishment proceedings were dismissed. To which ruling the plaintiffs excepted.

FRANK H. MILLER, by R. H. CLARK, for plaintiffs in error.

1st. The summons of garnishment served on the bank required an answer both as to Robert M. Adam, individually, and as a member of a firm, and is not void, for even an attachment may contain two grounds : 36 Ga., 89 ; 37 *Ibid.*, 18 ; 39 *Ibid.*, 82 ; 40 *Ibid.*, 386.

2d. The interest of Adam, as a partner, is liable to garnishment : 28 Ga., 68 ; 40 *Ibid.*, 104 ; 43 *Ibid.*, 325 ; especially

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if he makes the deposit, and is the only member of the firm in the State of Georgia.

3d. The firm of Adam, Smith & Company must interpose a claim under oath before they can be heard: Code, secs. 3725, 3731.

4th. The dissolution provided for in favor of a claimant relates only to the property claimed: Code, sec. 3541. As to anything else, the plaintiffs have the right to traverse the answer of the garnishee, or move for judgment.

5th. Adam deposits the money, signs the bond, dissolves the garnishment, checks it out of bank, files an answer denying the indebtedness of the firm to him, and has dismissed the whole garnishment proceeding. To sustain such a motion, and prevent a hearing on the part of plaintiffs, is a total denial of justice, for if no remedy is prescribed by law, it is the duty of the court having jurisdiction over the money to prescribe one: 40 Ga., 386; 39 *Ibid.*, 82. Especially if, by amendments, he can have justice done to all parties: Code, sec. 3562; *Cox vs. Cox*, decided May 20, 1873.

H. CLAY FOSTER, for defendants.

Code, section 1909, provides how interest of partner may be reached by a judgment: 43 Ga. R., 325; 40 *Ibid.*, 104.

MCCAY, Judge.

1. It is doubtless true that under the provisions of our Code, section 1919, the creditor of one of a firm cannot garnishee the debtor of the firm. Even before the Code this could hardly be done. On a sale of the firm's effects by the sheriff, the purchaser did not get a title to the goods, but bought the undivided interest of the debtor, which can only be ascertained by a settlement of the firm affairs. But the result of a garnishment is a judgment against the garnishee, to be followed by execution, and the raising and payment of the money to the judgment creditor; and when this is done, from the very nature of things, the money is severed from the firm effects and becomes the separate property of the plaintiff.

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in garnishment. Such a proceeding might be grossly unjust to the members of the partnership other than the original debtor. Even the levy and sale of the interest of one partner by the sheriff was an anomaly at the common law, since the debtor has, in fact, no interest, in his individual right, in any specific piece of property. All his interest is in the net proceeds of the assets after the debts are paid and the accounts between him and his partners are adjusted. For this reason our Code prohibits a sale by the sheriff of the interest of one partner, even in the whole of the assets, and forces a creditor of one of a firm to proceed by garnisheeing the firm and getting a judgment against it if the debtor has any interest after the settlement we have alluded to.

2. But the present case stands on a peculiar footing. The firm, as such, have made themselves parties to this proceeding by filing the bond provided for by the act of 1871, Code, 3541. They come into court and say the effects in the hands of the garnishee are not the property of the debtor, but they are the property of the firm. They are thus parties to the proceeding. They are practically the garnishees, under this act, and, under our law, as they may be garnisheed, we think the proceedings should not have been dismissed. By coming into the proceedings and making the firm a party thereto, they put the whole matter before the court in such a shape as that the true rights of all the parties can be ascertained and decided upon. The spirit of our law as it now stands, under section 3082 of the Code, is, that the superior court has jurisdiction to proceed to do justice when all the parties at interest are before it. Here was, in fact, the creditor of one of a firm, with his debt fully ascertained by a judgment. Here was the firm, and a debtor of the firm, all before the court; and it was possible so to determine as to do full justice to all parties.

We think the proceedings ought not to have been dismissed, but the plaintiff should have been allowed to traverse the answer and make up such an issue with the partnership, who had come in, under the act of 1871, as would ascertain what was the true interest of the judgment debtor in the firm as-

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sets, just as though he had filed a bill and had brought the parties before a court of equity. Under this issue, the interest of the individual partner, at the date of the judgment or since, could be ascertained, and so much of the debt in the hands of the garnishee as did not exceed that interest decreed to the plaintiff.

There is some objection to the duplicity of the plaintiff's summons; but an inspection of the whole matter shows that his proceeding is to find what the garnishee owes the judgment debtor; and the addition of the demand in the summons that the garnishee should answer what he owes the firm, is amendable. The garnishee has, too, waived that objection, because he has, in fact, answered. We think, therefore, that it was error to dismiss the proceedings.

Judgment reversed.

PATMAN LESTER, plaintiff in error, *vs.* SAMUEL P. THURMOND, defendant in error.

1. An attorney at law is protected by his privilege from liability on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved.
2. Where the plea of the general issue is filed to an action of slander, evidence is admissible thereunder rebutting and denying the proof introduced by the plaintiff.

Slander. Attorney at law. Privileged communications. Pleading. Evidence. Before Judge RICE. Clarke Superior Court. February Adjourned Term, 1873.

For the facts of this case, see the decision.

SPEER & THOMAS, for plaintiff in error.

COBB, ERWIN & COBB, by JACKSON & CLARKE, for defendant.

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WARNER, Chief Justice.

The plaintiff brought an action of slander against the defendant, alleging in his declaration that the defendant, as counsel representing one Eliza Kenny in a justice's court, on the trial of a criminal case, in which one Jesse Robinson was accused of the offense of malicious mischief in killing a hog or hogs of the said Eliza Kenny, did falsely and maliciously, in a certain discourse which he addressed to the court and jury, speak, utter and publish the following false, scandalous, malicious, defamatory words, to-wit: "Patman Lester, an able-bodied man, helped Jesse Robinson kill this poor widow's hogs." On the trial of the case, the jury found a verdict for the defendant. A motion was made for a new trial, on the several grounds set forth in the record, which was overruled by the court, and the defendant excepted.

1. Mason, a witness for the plaintiff, testified that he was one of the jurors who tried the case of the State *vs.* Robinson; that defendant was counsel for the prosecution; does not remember all that he said, but does remember that he said in his speech, "Patman Lester, an able-bodied, stout man, helped Jesse Robinson kill this poor widow's hogs;" does not know that there was anything in the evidence that implicated Lester with the case; he was not sworn as a witness. On being reintroduced, stated that there was no evidence that connected Lester with the killing of the hogs. This is the substance of the evidence for the plaintiff. Was this evidence sufficient, under the law, to entitle the plaintiff to a verdict? The words are proved to have been spoken by the defendant as an attorney at law, in the discharge of his duty as such, in the regular course of judicial proceedings before a court. The clear distinction which the law recognizes between words spoken by an attorney at law, in addressing a jury in the regular course of judicial proceedings, and the same actionable words spoken in private conversation, not privileged communications, is this: No action can be maintained against an attorney at law for words spoken to a jury, as in this case, without proof

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of *actual malice*, and it is incumbent on the plaintiff to furnish such proof; whereas, when actionable words are spoken in private conversation, the law implies that the words were spoken maliciously, and it is not incumbent on the plaintiff to prove malice. The attorney at law is protected by his privilege, on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. If, however, an attorney at law avails himself of his position as an advocate *maliciously* to slander another by uttering words wholly unjustifiable, then he would be liable to an action, but not otherwise. There not having been any evidence that the words alleged to have been spoken by the defendant to the jury in relation to the plaintiff in the regular course of judicial proceedings, were spoken *maliciously*, the plaintiff was not entitled to recover on his own evidence.

2. The evidence of the defendant, so far as the same rebutted or denied the evidence offered by the plaintiff, was admissible under the plea of the general issue. In the view which we have taken of this case, the motion for a new trial was properly overruled.

Let the judgment of the court below be affirmed.

GEORGE G. CRAWFORD, administrator, plaintiff in error, *vs.*
W. S. STETSON & BROTHER, defendants in error.

In a suit upon an unliquidated account, the plaintiff stated in his answers to interrogatories taken out in his own favor, to which was attached a copy of the account sued on, as follows: "We did keep a regular set of books in the years 1867 and 1868, and the account is correct:" Held, that this was not sufficient proof of the account; the answer, plainly, is based upon the books, and they should have been produced, proven and supported, in the usual way.

Account. Evidence. Before Judge BARTLETT. Morgan Superior Court. March Term, 1873.

Crawford *vs.* Stetson & Brother.

W. S. Stetson & Brother brought complaint against George R. Jessup on an account for \$282 95, with interest, attaching to their declaration a bill of particulars. The defendant filed several pleas, unnecessary to be set forth.

Pending the litigation, the defendant died, and George G. Crawford, as administrator *de bonis non cum testamento annexo*, was made a party in his stead.

The depositions of the plaintiffs were introduced, containing this answer to an interrogatory propounded to them: "We were merchants in 1867 and 1868, and kept a regular set of books in the years 1867 and 1868, and the account is correct." The account referred to was a copy of the bill of particulars attached to the declaration. This evidence was objected to, and the objection overruled. The jury found for the plaintiffs. A motion for a new trial was made, based upon the ground, amongst others, of the admission of the testimony aforesaid. The motion was overruled, and defendant excepted.

McHENRY & McHENRY; BILLUPS & BROBSTON, for plaintiff in error.

REESE & REESE, for defendants.

McCAY, Judge.

We do not enter upon the question as to the weight of the testimony in this case, except to say that we think the jury have been very liberal in their allowances to the plaintiffs below. We place our judgment upon the error of the court in permitting the plaintiffs to prove their account in the manner it is done in their answers to the interrogatories. An inspection of the account will show that whilst there are several large items in it, yet it is made up of a very large number of items, many of them small, and such as it is hardly possible for any human being to remember. The statement of the plaintiffs is, that they kept a regular set of books, and that the account is correct. One is driven, from the nature of the account and

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from the language used by the witnesses, that they mean by this it is correct according to the books, and that they do not testify of their own knowledge. To establish an account by books, the books must be produced and proven by those who have had accounts upon them, to be usually correct, and must, upon inspection by the court, be free from any suspicion of fraud: Code, sec. 3777. At best, this sort of evidence is only secondary, and secondary evidence of secondary evidence ought not to be used: 17 *Georgia*, 65; 18 *Ibid.*, 74; 18 *Ibid.*, 457, 693.

Judgment reversed.

BENJAMIN H. HILL, plaintiff in error, *vs.* JOSEPH W. CLARK
et al., administrators, defendants in error.

It is a good ground for continuance in the superior court, that the attorney who is the party to the case and the sole counsel, is at the time it is called for trial, engaged as counsel in the argument of an important case in the supreme court, the conflict in the hearing of the two cases being caused by an adjournment of the regular term of this court.

Continuance. Attorney. Absence of counsel. Before Judge RICE. Clarke Superior Court. August Term, 1873.

The defendants in error brought suit against the plaintiff in error on a promissory note for \$2,098 88, returnable to February term, 1870, of Clarke superior court. At the appearance term the defendant filed a plea to the merits of the action, and thus the parties were at issue.

Before the case was reached the defendant, in his character as defendant and as attorney representing the defense, applied in open court for leave of absence from the court, stating in his place the following facts as the ground for such application: That in consequence of the postponement of the July term of the supreme court for 1873, for one month, certain important cases represented by said attorney in said court, would render it impossible for him to be present in Clarke su-

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perior court, when his cases in said court, including this case, would be called in order; that the supreme court had no discretion to grant leave of absence, or to continue a cause, except for providential cause, and as the conflict of the two courts, and of the business of the applicant in the two courts, was brought about without his fault, and by causes over which he had no control, he asked for leave to be absent from Clarke superior court so long only as he would necessarily be in attendance on the supreme court, and especially as the conflict was brought about recently, and when it was too late to make arrangements to have the business in the two courts otherwise represented. The court below refused to grant the leave of absence on the ground that it had no such authority.

When the case was called for trial, the defendant, through counsel employed for that purpose, announced he was not ready, and moved the court for a continuance on the grounds before stated, and which were admitted as made for the purposes of a continuance, and also on the ground that defendant was sole counsel for the defense as well as defendant, and was unavoidably absent for the reasons above set forth, and that the case could not be safely tried without him.

The court overruled the motion for continuance, and defendant excepted to both the rulings of the court in refusing leave of absence, and also in refusing the continuance.

The plaintiffs went to the jury, exhibited the note sued on, and took a verdict. The defendant assigns error upon each of the above grounds of exception.

B. H. HILL & SON, for plaintiff in error.

SPEER & SPEER, for defendants.

TRIPPE, Judge.

The grounds on which the leave of absence was asked at the adjourned term in July, were made the ground for the motion for a continuance at the August term, when the case was called for trial. As the applicant for the leave of absence

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had the benefit of all the facts in the motion to continue, it may be said that the whole question is merged in the latter motion and the decision thereof. Moreover, it does not appear that the decision complained of, as to the refusal of the leave of absence, was made within a period prior to the sanction of the bill of exceptions that entitles it to be reviewed here. Objection was made against the right of the plaintiff in error to be heard on this point for that reason, and the objection seems to be well taken.

Did the showing made for a continuance entitle the movant to it? This court, on the first Monday in July, 1873, (the first day of that term,) adjourned until the first Monday in August. Mr. Hill was defendant in a case in Clarke superior court, and had no other counsel than himself. The case had been pending for some three years in that court. When the adjournment of this court was ordered in July, he was of counsel in an important cause pending in it, and, as was shown in the motion, was the counsel on whom his client mainly relied. This adjournment caused the conflict that occurred in the hearing of the two causes—his own case in the superior court, and the one in which he was counsel in the supreme court. He could not attend to both. There were but a few weeks between the time the adjournment of this court was ordered and the time both these cases were in order for trial.

The superior court is vested by law with a discretion as to continuance of cases that is not granted to this court. Here a continuance can be allowed only for providential cause. There, all such applications are addressed to the sound legal discretion of the court, and if not expressly provided for, shall be granted or refused as the ends of justice may require: Code, section 3531. Many special grounds are, by statute, provided as good causes for continuance. Amongst them is mentioned the fact that the party, or the leading or sole counsel, is providentially prevented from attending the trial. After stating this, amongst others, the Code makes the general provision as above quoted, and leaves the question of continuance, when not expressly provided for, to the sound legal dis-

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cretion of the court, to be exercised as the ends of justice may require.

It is argued that as the statute, in terms, makes the absence of a party or counsel for providential cause a ground for continuance, that the court can have no discretion in the matter, unless the absence be for such cause; and further, that the cause means such an one as is referable to divine providence. Whatever the statute may mean by the term "providential cause," to hold as is claimed by counsel for defendant in error, would be shutting in parties, counsel and courts, to a rule that would not only not reach what the ends of justice require, but would often overthrow justice itself. A party to a cause might, by the fraud of his antagonist, be induced to be absent. He might be kept from attending court by an assurance from the other side that his case would not be pressed. If his counsel could show this, and that his presence was necessary, would not a continuance be allowed, although his absence would not be for a providential cause? In the same manner might the attendance of counsel be prevented. The party or his counsel, whilst on their way to court, might, by a sudden accident or injury to the horse or vehicle with which they were traveling, be disabled from reaching the court in time. Or it might be that the railroad cars, which were the means of conveyance, might be thrown off, or by other mishaps, delay them. Many other causes might occur that would disable them from being present in due season, over which they had no control and for which they could be charged with no default. It would be a harsh rule that would allow such as this to constitute a legal reason for denying suitors to be heard in the courts.

Doubtless any court which has the powers of the superior court in the premises, would and should listen to applications for continuances founded on such causes, as strong appeals to its sound legal discretion.

So, as in this case, if a sudden change be made in the order of holding the courts, whereby such a conflict occurs as is here presented, neither an attorney or suitor should be forced to

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the necessity of going to trial without a reasonable time for preparation therefor. And as this court could have had neither power or any discretion to exercise in the case here, it was a right that the plaintiff in error had to ask the continuance he claimed.

We say nothing as to the legal sufficiency of the pleas filed. Courts do not scrutinize very closely the pleadings on a motion for continuance. No demurrer was made to the pleas in the superior court. Besides, they can be amended, both in matter of form and substance, if necessary.

Judgment reversed.

ELLIS W. CLEMENTS *et al.*, plaintiffs in error, vs. EMANUEL LYON, for use, etc., defendant in error.

When a purchaser of land at a sheriff's sale failed to take a deed from the sheriff, and twelve years thereafter he applied to the judge of the superior court for an order directing the then sheriff to make the deed :

Held, that the defendant in execution, or his heirs-at-law, might tender an issue as to the legality and fairness of the sale, and it was error in the court to refuse to permit such an issue.

Judicial sale. Sheriff. Deed. Practice in the Superior Court. Before Judge McCUTCHEON. Polk Superior Court. October Adjourned Term, 1873.

On the first Tuesday in April, 1861, a lot in Cedartown was sold under an execution in favor of Emanuel Lyon, as administrator of A. G. Love, deceased, against Brooks M. Willingham, and is claimed to have been bid off by Frank Lyon, who transferred his bid to Emanuel Lyon, his father. No deed was made by the sheriff, though the purchase money was then paid. At the October adjourned term, 1873, of Polk superior court, Emanuel Lyon, for the use of J. S. Moyes, who held under him, petitioned the court for a rule requiring Ellis W. Clements, the then sheriff of said county,

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to show cause why he should not convey said lot to petitioner, by deed, in accordance with said sale. In response to this rule, the sheriff set up that he had been notified by the heirs of Brooks M. Willingham, the defendant in execution, not to execute such deed on account of the illegality of said sale, in this, that the lot was sold by the petitioner, the then deputy sheriff of said county, and bid in by himself.

The sheriff and said heirs proposed to prove the aforesaid facts, and others, showing the invalidity of said sale. The court refused to allow said heirs to defend the proceeding on said rule, excluded the aforesaid testimony, and passed an order requiring the sheriff to execute a deed to said lot, as prayed for. To which the sheriff and said heirs excepted.

E. N. BROYLES; THOMSON & TURNER, for plaintiffs in error.

WRIGHT & FEATHERSTON; J. A. BLANCE, for defendant.

McCAY, Judge.

We think the court should have heard the application of the heirs of the defendant in *fl. fa.* to be permitted to come in and show, if they could, that the sale in 1861 was fraudulent or illegal. True, the sheriff was the party the rule called upon, but the applicants were the real parties at interest, and under our broad system of pleading at law it would be an anomaly to stick so close in the bark as to rule out the real parties at interest, on the ground that the sheriff is the party called on. Nothing is more common in proceedings against the sheriff than side issues of this character. The court could have required a regular issue to be made up and tried before a jury, and the rights of the parties settled without further complication. In Wade *vs.* Simeon, 13 M. & W., 649, Pollock, C. B., says: "We think there can be no doubt that in any stage of the proceedings, as long as there remains any necessity for an appeal to the authority of the court, or any occasion to call on the court to exercise its jurisdiction, it has

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an undoubted right to interfere; and it is its duty to do so if it perceives that its process or jurisdiction is about to be used for purposes inconsistent with justice." And at this term, where the plaintiff in a *judgment* had taken it wrongly and moved to amend it, we held that the defendant might plead a defense, newly discovered, to the merits of the action. So, too, in *Bass vs. Irvin*, at the last term, we held that on a motion to put a verdict *nunc pro tunc* on the minutes the defendant might show that the verdict was rendered on Sunday, and was therefore illegal. In this case the defendant in execution proposes to show that there was never any legal sale of this property. If this be so in fact, it is not fair to him that his right shall be further complicated by the act of the court. For these reasons we think the defendant in *f. fa.* or his heirs should have been allowed to come in and show the truth of the case, and if the sale was void no deed ought to be made.

Judgment reversed.

THOMAS H. MOODY, administrator, plaintiff in error, *vs.*
WILLIAM B. METCALF *et al.*, defendants in error.

1. Where complainants make the defendant their own witness by praying discovery, he is bound to relate the whole truth and to explain the entire transaction with which he is charged. All statements in his answer, to this end, are responsive to the bill.
2. The court should always confine itself to its appropriate functions on the trial of cases, by an impartial administration of the law applicable to the facts before it, and leave the jury to perform their appropriate functions, without any indication as to what it may think their verdict should be, or what may be its opinion of the evidence, or the credibility of the witnesses.

Equity. Discovery. Charge of court. Before Judge BARTLETT. Morgan Superior Court. September Term, 1873.

This case is sufficiently reported in the decision.

REESE & REESE ; J. J. FLOYD, for plaintiff in error.

A. G. & F. C. FOSTER, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant, as administrator of John L. Moody, deceased, for relief and account. The defendant, in his answer, set up title in his own right to nearly all the property of which his intestate was in possession at the time of his death, claiming the same under deeds of conveyance alleged to have been executed and delivered to him by the intestate in his lifetime. The complainants alleged in their bill that if the defendant claims title to the property under any papers or evidence thereof in his possession, he came by the same by finding them amongst the papers of the deceased, which had never been delivered nor intended to be delivered, and were, in law, nothing but escrows, with a prayer for discovery as to the several matters charged in complainant's bill. The main question in controversy at the trial was as to the delivery of the deeds by the intestate to the defendant, under which he claimed title to the property. There was a good deal of evidence in relation to that question, as well as to the possession and dominion of the property, the giving it in for taxes, etc. The jury, under the charge of the court, found a verdict in favor of the complainants. The defendant made a motion for new trial on the several grounds set forth therein, which was overruled by the court, and the defendant excepted.

1. One of the grounds of error alleged is, that the court charged the jury that such parts of the defendant's answer as were in relation to the execution and delivery of the deed and bills of sale, were not responsive to the charges of complainants' bill, and, therefore, were not evidence before the jury, and were not to be considered by them in making up their verdict. The complainants charge, in their bill, that the defendant took possession of the whole estate of the intestate, and had himself

appointed administrator of the same; that he has failed to have the same appraised only in a very small amount; that he claims the same under some pretense; and also charge, that if any paper, or other evidences, are in his possession, he came by them by finding them amongst the papers of deceased, the same never having been delivered, nor intended to be delivered, and were, in law, nothing but escrows. The prayer of the complainants' bill is, that the defendant make full, true and perfect answers, upon his corporal oath, to all the matters and things charged and set forth therein, and specially interrogates him in relation thereto. The defendant's answer to this charge, and in explanation of his taking possession of the property, and of the nature of the papers under which he pretends to claim the same, and how he came by them, for the purpose of showing the same were not escrows, but were in his possession, and delivered to him by the intestate, was responsive to the charge made in complainants' bill, according to the ruling of this court in *Eastman vs. McAlpin*, 1 *Kelly's Reports*, 170. The complainants made the defendant their own witness to answer the charges made against him, and he was bound to answer those charges fully; not to tell a part of the truth in relation thereto, but the *whole truth*; in other words, to explain the whole transaction with which he was charged in the complainants' bill.

2. In looking through the charge of the court to the jury, in view of the evidence in the record we are satisfied the case was not fairly submitted to the jury, so far as the defendant was concerned. The charge of the court was one-sided—that is to say, it gave an undue weight to the evidence of the complainants over that of the defendant, throughout the entire charge, and especially in that part of it in relation to the declarations of the intestate when in possession of the property, that it belonged to his son, and his controlling the property up to the time of his death, to-wit: "I give you this in charge, gentlemen, upon the principle that acts speak louder than words." As before remarked, the main question in the case was whether the deeds under which the defendant claimed

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title to the property had been delivered to the defendant by the intestate? Did the defendant have possession of them in the lifetime of the intestate? It was the duty of the court to have charged the jury what would constitute a delivery of a deed under the law, and then to have left the question with them to find whether there had been a delivery of the deeds under the evidence. The court should always confine itself to its appropriate functions, on the trial of cases, by an impartial administration of the law applicable to the facts before it, and leave the jury to perform their appropriate functions without any indication from the court as to what it may think their verdict should be, or what may be its opinion of the evidence or the credibility of the witnesses.

Let the judgment of the court below be reversed.

HENRY CLEWS & COMPANY *et al.*, plaintiffs in error, vs. THE FIRST MORTGAGE BONDHOLDERS *et al.*, defendants in error.

1. In the case of a creditors' bill to marshal the assets of an insolvent railroad company, there had been a receiver appointed; the claims of all the parties had been referred to a master who had made a report, fixing the amount, character and liens of the several claimants upon the fund, and this report had been excepted to, and each claim had been considered and passed upon by the jury, or by consent by the judge without a jury, and a judgment taken fixing the amount, character and lien upon the fund of each, and thereupon there had been a decree taken, by consent of all parties, for the sale of the road, and that the proceeds should be brought into court and be distributed according to the liens fixed by the decree, reserving the rights of certain parties, where claims were yet unsettled, and the road was sold, and at the next term of the court, the court passed a final decree, holding up so much of the proceeds as was necessary to pay the claimants then before the court the amount and lien of whose claims were yet unsettled, and ordering the remainder of the fund to be paid out by commissioners, according to the consent decree, and barring all others: *Held*, that such a final decree was right and proper under the facts of the case; that it needed no intervention of a jury, and was only the final judgment of the court to carry into effect through ministerial officers the previous decree, taken by consent of all parties.

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2. A decree by a court of record purporting upon its face to be taken by consent of all parties to the record, has the verity of a record as to the recital of the consent, and is not to be controverted except for fraud, accident or mistake, and then only on a proceeding directly to set it aside.

Equity. Decree. Evidence. Record. Before Judge SCHLEY.
Glynn Superior Court. November Term, 1873.

To report this case would simply be to repeat the facts recited in the above head-note.

The decree objected to was proposed to be taken by the counsel for the first mortgage bondholders of the Brunswick and Albany Railroad Company and certain other preferred claims. It was resisted by counsel for Henry Clews & Company and the general creditors, upon the grounds that it was illegal, that it could not be passed without the intervention of a jury, and that the case was not ripe for judgment. The objections were overruled, and Henry Clews & Company *et al.*, excepted.

DANIEL S. PRINTUP; J. C. NICHOLS; A. J. SMITH; W. M. SESSIONS, for plaintiffs in error.

O. A. LOCHRANE; A. O. BACON, for defendants.

McCAY, Judge.

1. We see no good objection to the final judgment complained of. All the issues save those expressly excepted in the judgment, had either been passed upon by a jury or by the judge, by consent, without a jury. A final decree had been taken by consent, the road sold, and the fund in court. The mere division of the money according to the judgments was a ministerial duty. It consisted simply in calculations, additions, etc., and inspection of papers and amounts. The statute requires the court, the judge, to sign the final decrees or judgments in equity. They are the judgments of the court on the findings of the jury, or other agreed tribunals, and in this case the judge has only performed that act and enter-

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ed a judgment in accordance with the previous consent decree. It has ever been the practice in chancery proceedings to pay out money as fast as it can be done. It is contrary to public policy to keep it on hand whenever it can be paid out with safety to the claimants. In this case a full reserve was kept back to pay any parties before the court whose rights were yet unsettled. We think Clews & Company's rights fully protected as far as they in fact exist. The claim to put in these coupons prior to the other bonds we think preposterous. Our statute applying judgments first to interest is simply a rule for the application of payments, and has nothing to do with the case of one holding a bond and the other a coupon upon it. They both stand on the same footing. As to the objection that this fund ought to be kept in hand until other claimants come in, we are not disposed to interfere. It was a matter for the judge to determine in his discretion. A creditors' bill is a *quasi* proceeding *in rem*. Reasonable time ought to be afforded. In a matter so public as this, the insolvency of a railroad company, involving as this did issues of great notoriety and importance, as proclamations by the governor and investigating committees by the legislature, we think plenty of time was given.

2. A recital is a decree put upon the records, is a record, and imports verity. It is of higher dignity even than a writing, and we are clear that any such recital binds the parties. It is conclusively presumed that the court had whatever evidence of consent the law requires, and it can only be attacked as any other judgment.

Judgment affirmed.

WILLIAM PRITCHETT *et al.*, plaintiffs in error, vs. P. & J. M. PATTERSON, defendants in error.

Whilst this court is not exactly satisfied with the judgment of the court below, yet as the case is one of granting a new trial so that the parties may have another hearing, we do not think there has been such an

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abuse of the discretion vested by law in the judge of the superior court to grant a new trial on the ground of the verdict being contrary to the weight of the evidence, as to require a reversal of his judgment.

New trial. Before Judge KNIGHT. Gilmer Superior Court. May Term, 1873.

P. & J. M. Patterson brought complaint against William Pritchett, Jones Pritchett and Henry Pritchett, as surviving makers, on a note made by said defendants, together with Messer Pritchett, deceased, on December 22d, 1857, payable five years after date to plaintiffs, or bearer, with interest from date, for \$500 00, with a credit thereon of \$192 00, of date December 13th, 1863.

The defendants pleaded as follows:

1st. Tender in 1863 of the full amount due on said note to Jeptha Patterson, the agent of the plaintiffs to collect the same; that the tender was made in Confederate money, which said agent had promised to receive, but which he subsequently refused to accept, by means of which said amount was lost to the defendants.

2d. That the plaintiffs, in selling the land for which said note was given, showed to the defendants lot number three hundred and twenty-one, in the sixth district and second section of Gilmer county, as one to be sold to them, to which lot they never had any title; that when the bond for titles was executed, lot number three hundred and twenty was inserted, plaintiffs representing that it was the lot which had been exhibited to the defendants; that lot number three hundred and twenty-one, the lot really shown to defendants, exceeded in value lot three hundred and twenty, the one actually embraced in the bond, by \$250 00; that the plaintiffs agreed to deduct the difference in value between said lots from said note, but thus far have failed to comply with said undertaking.

3d. That defendants paid the plaintiffs in 1858, \$125 00 on said note, in a horse sold to them, which credit has never been entered thereon.

The plaintiffs introduced the note sued on and closed. The

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defendants testified substantially to the facts set forth in the pleas. Austin Painter, Riley Minton and James Head sustained the third plea. Head testified, in addition, that lot three hundred and twenty-one is worth \$250 00 more than lot three hundred and twenty.

It was admitted by the plaintiffs that Jeptha Patterson was their agent to collect the note sued on.

The evidence of the plaintiffs and of their agent flatly contradicted the testimony of the defendants in every material point. The plaintiffs stated that it was impossible for there to have been any mistake as to the lots sold ; that defendants were better acquainted with said lots than the plaintiffs, as William Pritchett had been living on the land for two or three years before the sale ; that the land was sold by the plat and grant, which the parties had before them ; that William Pritchett traced the lines by the plat and grant before the plaintiffs purchased the property.

The evidence of the plaintiffs as to the sale of the horse to them by the defendants for \$125 00, to be entered as a credit on the note, was excluded, upon the ground that the testimony disclosed that if such sale was made at any time, Messer Phitchett, since deceased, was the other contracting party.

The jury returned a verdict for the defendants. The plaintiffs moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was sustained, and defendants excepted.

THOMAS F. GREER, for plaintiffs in error.

J. A. JERVIS; C. D. PHILLIPS, for defendants.

TRIPPE, Judge.

As reluctant as this court is to interfere with the discretion of the judge of the superior court when he refuses to grant a new trial on the ground that the verdict is contrary to the evidence or the weight of the evidence, it is still more disinclined to control that discretion when a new trial is granted on that ground.

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In this case, had the new trial been refused, we would not have reversed the judgment; and though we are not exactly satisfied with its being granted, yet as thereby the parties will have another hearing, and there is certainly strong evidence against the verdict, we permit the judgment to stand. The plea of tender, and the testimony of one of the plaintiffs affirming it, is at least very suggestive against a portion of the defense set up, and which was sustained by the verdict.

Judgment affirmed.

THE DAWSON MANUFACTURING COMPANY, plaintiff in error, *vs.* THE BRUNSWICK AND ALBANY RAILROAD COMPANY *et al.*, defendants in error.

Under the construction of the contract and of the order of the court permitting the plaintiff in error to take from the receiver the cars in dispute, on his giving up his right to go upon the general fund for the amount of his debt, reserving his right to claim hire and damages, we are of opinion that the court erred in ruling out the testimony as to the value of the rent of the cars and the damage to the cars over and above the wear and tear, and on this ground we think there ought to be a new trial. As to the six cars not delivered, we do not see that any issue was made as to them.

Contracts. Evidence. Before Judge SCHLEY. Glynn Superior Court. May Adjourned Term, 1873.

The Dawson Manufacturing Company, on 5th August, 1871, entered into a written contract with the Brunswick and Albany Railroad Company, by which it made for it twenty-five platform and fifty box cars, and, as security for the payment of certain notes taken for them, it retained the title and ownership of the cars, and reserved the right, in case of the non-payment of any of said notes, without impairing the effect and validity of said notes, to resume possession thereof; and the Brunswick and Albany Railroad Company agreed to surrender up the same, and the Dawson Manufacturing Company

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then had the right to sell the cars at public auction on ten days' notice, and apply the proceeds to the notes.

After the bill in this case was filed, an injunction ordered, and a receiver appointed, these cars went into his possession, and the Dawson Manufacturing Company was made a party defendant. An answer was filed and the injunction dissolved as to it. Thereupon the cars, except six, were returned.

The interlocutory decree under which this was effected, provided that "the Dawson Manufacturing Company may go forward and make proof before the jury at the final trial of said cause, unless it can be agreed upon by counsel what said Brunswick and Albany Railroad Company may be indebted for rent due for the use of the said cars, and for damages to them, over and above the usual wear and tear in service, or for any loss or destruction of any one or more of said cars. It being distinctly understood, that in consideration of the foregoing, said Dawson Manufacturing Company gives up and abates all claim of damages against said railroad company for any loss it has suffered by reason of the non-payment of said notes for said cars, under said contract, other than rent or damages for the injury, loss or destruction of said cars, or any of them, aforesaid, and the claim submitted to the master on said notes to be withdrawn."

Under this interlocutory decree the claim for over \$41,000, which had been presented to the master and adjudged correct by him, was withdrawn, and the claim of the Dawson Manufacturing Company was presented to the jury; and an issue tendered thereon, for the following amounts:

1872

Feb. 27th. For rent of cars, to-wit: 80 box cars from 15th June, 1871, at \$45 00 each, per month.....	\$11,340 00
To rent of 25 box cars same time and same price.....	9,450 00
To value 6 box cars never turned over, but transferred by T. A. Burns, superintendent, and Hazlehurst & Minnehan.....	48,000 00
To loss and damages and injury to 49 cars at \$200 00 each....	9,800 00

Upon the trial the court held that the Dawson Manufacturing Company could recover neither rent nor damages, and the

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jury consequently returned a verdict for the defendant. To which ruling the Dawson Manufacturing Company excepted.

No issue seems to have been made as to the six cars not delivered.

HINES & HOBBS, for plaintiff in error.

O. A. LOCHRANE; W. M. SESSIONS; McLAWS & GANAHL, for defendants.

McCARTY, Judge.

There may be grave doubt whether the contract under which these cars were delivered by the plaintiffs to the railroad company was not in truth a mortgage. The form of every mortgage is a deed to the property, subject to conditions. It is the circumstance that the arrangement is only a security for the payment of money, that characterizes the instrument as a mortgage, and much might be said in favor of that being from the face of it the sole purport of this contract. But however this may be, the plaintiffs, in their answer and in their motion to dissolve the injunction, treated the paper as reserving to them the title, and as making the sale only conditional, and so the judge treated it in his judgment dissolving the injunction and giving them up the cars. He expressly required them to give up their claim on the railroad for their notes, the price of the cars. This judgment also expressly allowed them to put before the receiver their claim for rent and for damages. Nobody objected to or appealed from this judgment, and they are therefore to be held as assenting to it. If the trade was rescinded for non-payment of the money, we think in equity the car company has a right to rent and to damages. On what principle can the railroad company be presumed to keep and use the cars, not pay for them, and force the builders to assert their title, and not pay for the use of them in the meantime, as well as damages for their misuse. We say nothing as to the six cars, as, so far as we can see, that issue was not distinctly made.

Judgment reversed.

Wingfield *et al.* vs. Virgin *et al.*

JOHN T. WINGFIELD, administrator, *et al.*, plaintiffs in error,
vs. BELLE VIRGIN *et al.*, defendants in error.

1. When the legal title to property is vested in a trustee for infants, who can sue for it, and who fails to do so within the time prescribed by law, so that his right of action is barred, the infant *cestui que trustis*, who have only an equitable interest in the property, will be also barred; but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy.
2. In order to defeat a prescriptive title for fraud, the claimant's written evidence of title, under which he went into possession of the property, must be shown to have been fraudulent within his own knowledge, or notice thereof brought home to him before or at the time of the commencement of his possession.

Prescription. Statute of limitations. Trusts. Infants. Before Judge POTTLE. Wilkes Superior Court. December Adjourned Term, 1873.

For the facts of this case, see the decision,

R. TOOMBS, for plaintiffs in error.

W. M. & M. P. REESE, for defendants.

WARNER, Chief Justice.

In November, 1861, John B. Weems, who had intermarried with Elizabeth Wingfield, for the purpose of protecting his wife's equity in her share of her deceased father's estate, jointly with her, executed a deed of trust conveying to S. B. Wingfield, her brother, all the property to which she was entitled as a distributee of her father's estate, upon certain declared trusts expressed in said deed, one of which was that said trustee was to hold the said property for the sole and separate use of his said wife and children, born and to be born, the income of said property to be applied to the support, maintenance, education and use of the family, and not to be subject to the debts of said Weems, and at the death of himself and wife, or the survivor of them, the *corpus* of the property,

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with its profits, to be divided amongst their children. This deed was recorded within three months after its execution. A part of the property assigned to Mrs. Weems as a part of her father's estate, and conveyed to the trustee, was a house and lot in the town of Washington, which is now the subject matter of controversy. Wingfield, the trustee, never took possession of the house and lot, but it was taken possession of by Weems, managed and controlled by him, and whilst in the possession thereof, and acting as trustee for his wife and children, did, on the 14th day of October, 1863, sell and convey the said house and lot to one Nicholas Wylie for the sum of \$17,500 00, signing the deed of conveyance as trustee for his wife, and the said Wylie went into the possession of the same under said purchase, and continued in possession thereof up to the time of his death, and by his legal representative since his death. On the 14th day of November, 1864, Wingfield, the trustee named in the original deed of trust, and Mrs. Weems, executed another deed to Wylie, conveying the premises to him for the consideration of \$17,500 00, as expressed in the deed, but, in fact, no money was paid when the last deed was executed. The complainants, the children of Weems and wife, all being minors, filed their bill against the defendants to have the trust re-established, which they allege has been destroyed, the aforesaid deeds canceled, and an account taken of the rents and profits of the property, a new trustee appointed, and the trust executed in conformity with the terms of the original trust deed. Wylie's legal representative, one of the defendants, claimed a title to the house and lot by prescription, under the statute. On the trial of the case, the jury, under the charge of the court, found a verdict for the complainants. A motion was made for a new trial, which was overruled, and the defendant excepted.

1. Did Wylie, in his lifetime, acquire a good prescriptive title to the house and lot as against the complainants? What constitutes a title by prescription? Title by prescription is the right which a possessor acquires to property by reason of the continuance of his possession for a period fixed by the

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law. Possession, to be the foundation of a prescription, must be in the right of the possessor and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted and peaceable, and be accompanied by a *claim of right*. Adverse possession of lands, under written evidence of title for seven years, shall give good title by prescription. But if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon: Code, 2678, 2678, 2680. There is no dispute as to the fact that Wylie was in possession of the house and lot for more than seven years under the first deed executed by Weems, as trustee for his wife, before the filing of complainant's bill, and it must be admitted, from the evidence in the record, that he went into the possession of the property under written evidence of title, and held that possession under a *claim of right*, having paid a fair and valuable consideration for it. There is no evidence of any *actual fraud* in the procurement of the deed for the house and lot by Wylie from Weems, which is necessary to be proved in order to defeat his prescriptive right of possession; in other words, there is no evidence that his possession under that written evidence of title *originated in fraud*, but on the contrary the purchase of the property appears to have been made in good faith, and for an adequate valuable consideration paid at the time he went into the possession of the property under written evidence of title. But it is said the complainants were minors, and that the statute did not run against them in favor of his prescriptive title. It will be noticed that the legal title to the property was in Wingfield, the trustee, by the original trust deed, and not in the complainants, and cannot vest in them until the death of Weems, their father. The Code declares that no prescription works against the rights of a minor during infancy: Code, 2686. By the act of 1817, Cobb's Digest, 567, it is declared that the statute of limitations, when it has commenced running, shall not so operate as to defeat the interest acquired by infants after its commencement. This

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court, in construing the act of 1817, in *Pendergrast vs. Foley*, 8 *Georgia Reports*, 1, held that the interest of infants, as contemplated by that act, must be such an interest as would enable them to maintain a suit in their own names for the property, as where the legal title to lands is cast upon the infant heirs of the deceased ancestor. The court also held in that case, that when the legal title to property was in an executor, administrator or trustee for an infant who neglects to sue within the time prescribed by law, the statute of limitations shall bind the infant, and such is believed to have been the uniform ruling of this court: *Worthy vs. Johnson*, 10 *Georgia Reports*, 358. If the words "interest acquired by infants" in the act of 1817, was properly construed by this court to mean a legal title in them, the words "rights of a minor during infancy," as mentioned in the Code, should receive the same construction. In *Ladd & Wilson vs. Jackson*, 43 *Georgia Reports*, 288, this court held that the statute did not run against the minor children in that case, because the legal title to the land was vested in them. The distinction is this, when the legal title to the property is vested in a trustee who can sue for it, and fails to do so within the time prescribed by law, and his right of action is barred, the infant *cestui que trusts*, who have only an *equitable* interest in the property, will be also barred; but when the *legal* title to the property is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. In the case before us, the legal title to the property in controversy never was in complainants, and could not be until the death of Weems, their father; and therefore Wylie's title by prescription was good as against Wingfield, the trustee, who had the legal title to the property, and he being barred from recovering the possession of it, the complainants, his infant *cestui que trusts*, are also barred.

2. It is insisted that the taking of the second deed by Wylie from Wingfield, the trustee, on the 14th of November, 1864, to the property, will defeat his prescriptive right of possession under his first deed, because the second deed was a fraud

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on the rights of the complainants. Although the obtaining the second deed may have been a legal fraud so as to prevent him from acquiring any rights under it, still, it cannot have a *retroactive* operation so as to defeat his prescriptive title acquired under his first deed. Wylie's prescriptive title did not originate under the second deed, but originated under his first deed, and his possession commenced under it, and not under the second deed; besides, it does not appear from the evidence that there was any *moral fraud*, any covinous intention, in procuring the second deed. Wylie had honestly bought the property and paid a fair consideration for it, and doubtless believed he had a good title from Weems, but when he ascertained the contrary, it was but natural that he should desire to procure a better title from the trustee, and all the parties knowing that he had paid his money for it, including Mrs. Weems, she united with the trustee in making him another deed, expressing therein the consideration which he had paid when the first deed was executed, that is all of it in relation to the *mala fides* of that transaction. But assuming that there was actual moral fraud on the part of Wylie in procuring the second deed, as the complainants contend there was, still, his prescriptive title under which he claims the possession of the property did not originate under that deed. In order to defeat Wylie's prescriptive title for fraud, his written evidence of title, under which he went into the possession of the property, must be shown to have been fraudulent within his own knowledge, or notice thereof brought home to him before or at the time of the commencement of his possession. There being no evidence in the record of any actual fraud on the part of Wylie when he purchased the property from Weems and took his deed as trustee for his wife therefor, and went into the possession of it under a *claim of right* as his own property, and continued in possession for more than seven years, he acquired a good prescriptive title to the property under the statute as against the trustee of the complainants who had the legal title to it, and the trustee being barred of his right to recover it, the complainants, his *cestui que trusts*,

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were also barred, they not having any *legal title* to the property vested in them, which would prevent the running of the statute against them as infants, according to the uniform rulings of this court heretofore made. To except minors during infancy from the operation of the statute, the legal title to the property must be in them.

Let the judgment of the court below be reversed.

JOHN T. ARNOLD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Under an indictment against A for assault with intent to murder B, by shooting at him, willfully and feloniously, with a loaded pistol, the jury found the following verdict: "We, the jury, find the defendant guilty of shooting, not in his own defense, and recommend him to the mercy of the court."

Held, that the verdict is not void for uncertainty, and that judgment may, by reference to the indictment, be entered upon it for shooting at B, not in his own defense, and without justification.

Criminal law. Verdict. Judgment. Before Judge BARTLETT. Baldwin Superior Court. August Adjourned Term, 1873.

Arnold was placed upon trial for the offense of assault with intent to murder, alleged to have been committed upon the person of Elliot Flint, on July 29th, 1872, by shooting at him with a pistol. The defendant pleaded not guilty. The jury returned the following verdict:

"We, the jury, find the defendant guilty of shooting, not in his own defense, and recommend him to the mercy of the court."

The defendant moved in arrest of judgment, because the verdict specified no crime. The motion was overruled, and the defendant excepted.

CRAWFORD & WILLIAMSON; SANFORD & FURMAN; W. A. LOFTON, for plaintiff in error.

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1st. The verdict does not "cover the issues made by the pleadings :" Code, sec. 3559, and cases cited. These "issues" are: 1. That he "shot at another :" Code, sec. 4370 ; 28 Ga., 395. 2. "Without justification." The plea of "not guilty," implies other "justifications" as well as "self-defense :" Act 1855-6, p. 265 ; Code, sec. 4370 ; 28 Ga., 367.

2d. The verdict describes no crime for which sentence may be pronounced : Code, sec. 4370 ; 28 Ga., 367, 395 ; 30 *Ibid.*, 608 ; 40 *Ibid.*, 150.

3d. Defendant, having been "in jeopardy of life or *liberty*," is entitled to discharge : Constitution 1868, Art. I., sec. 8 ; 3 Ga., 56, 73 ; 28 *Ibid.*, 367.

J. W. PRESTON, Solicitor General, for the State.

1st. If the indictment is sufficient, and the verdict covers all the material allegations in it, and is reasonably certain and formal, so that the court may readily determine from it and the other pleadings and facts what offense is intended, judgment will not be arrested because the verdict does not follow the exact language of the Code: 2 Kelly, 137 ; 26 Ga., 593, 602 ; 45 *Ibid.*, 57 ; 25 *Ibid.*, 689 ; 3 Graham & Waterman on New Trials, 1390, 1377 ; 1 Bish. Cr. I., 677, *et seq.*; 3 Bouv. Inst., 501, 520, and notes.

2d. The name given to the offense does not characterize it, but the substance described in the statement does : 3 Kelly, 417 ; O'Halloran *vs.* The State of Georgia, 31 Ga., 206 ; 32 *Ibid.*, 251.

3d. Verdicts are to have a reasonable intendment, are to receive a reasonable construction, and are not to be avoided, unless from necessity : 17 Ga., 361 ; Code, sec. 3561 ; 39 Ga., 664, (2.)

McCAY, Judge.

Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be set aside unless from necessity : Code, 3561 ; 17 *Georgia*, 361 ; 39 *Ibid.*, 664. And this is the general spirit of the Code, as well as the ex-

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pression of the more universal tendency of jurisprudence towards freedom from that slavish adherence to technical nicety which is the reproach of the common law.

In every verdict there must be a reference to the indictment and the issue to make it have any meaning. The verdict is the response of the jury to the charge and to the issue formed upon it. Ordinarily the verdict is "guilty" or "not guilty." The verdict is general and its legal effect is guilty or not guilty of the charge as laid in the indictment.

If the charge be murder, and the jury say we find the defendant guilty of assault; it means of assault upon the person charged at the time and place charged, and that the assault was without justification. So here the charge was assault with intent to murder A B, at a certain time and place, illegally and feloniously, by shooting at him with a loaded pistol with intent to murder. In this is involved, as a legal necessity, that he did shoot at A B not in his own defense and without justification. The jury negative the malice, the intent to murder and simply find the shooting. But what shooting? The shooting charged, but without the intent to murder. The verdict to be perfectly formal might go further and say shooting at A B not in his own defense and without justification. But we see no imperative requirement for this additional detail. All this is charged in the indictment and the verdict of the jury may just as properly be aided by the indictment as to these things, as it may by the name of the party shot at, and the time and place of the occurrence. The case of *Cook vs. The State*, 26 *Georgia*, 593, is very like this. The jury found the defendant guilty of "harboring." Harboring what, and how? Why plainly the slave of A B at the time and place stated and *to the injury of A B*: See, also, 25 *Georgia*, 494; *Ibid.*, 689.

Judgment affirmed.

Dunnaboo *vs.* Holland *et al.*

JOHN B. DUNNAHOO, plaintiff in error, *vs.* **JAMES H. HOLLAND**, executor, *et al.*, defendants in error.

1. Under the act of 1866 and the constitution of 1868, which secure to a married woman, as her separate estate, all property given to, inherited or acquired by her, the husband cannot assert her rights in reference to such property in his own name. (R.)
2. When a daughter is excluded by her father's will from any interest in his estate, and the executors agree with her husband, in order to prevent a caveat, that said estate, with certain exceptions, shall be equally divided between all his children according to appraisement, each child accounting for any indebtedness existing to the estate, and there was at the time of said agreement a suit pending in favor of the executors against such husband on a note, to a portion of which he had a substantial defense, upon which the executors entered a judgment within a few weeks after the contract aforesaid, without his knowledge or consent, he, relying upon said agreement, giving no further attention to the same, the enforcement of said judgment will be enjoined. (R.)
3. As the agreement provides that when the estate is ready for distribution, it shall be paid out "to each of the children of the deceased," the husband of one of the daughters cannot, by a bill filed in his own name, enjoin a suit pending against him for the purchase money of property of the estate sold by the executors, for the purpose of setting off against said claim his wife's interest in said estate. For the same reason the other children must be made parties. (R.)
4. As the will conveyed certain lands to the children of complainant, and as the subsequent agreement did not affect them, they were not necessary parties. (R.)

Husband and wife. Separate estate. Equity. Parties. Injunction. Set-off. Executors and administrators. Compromise. Before Judge RICE. Jackson county. At Chambers. January 3, 1874.

For the facts of this case, see the decision.

J. B. ESTES; W. L. MARLER, for plaintiff in error.

WILL. J. PIKE; M. PITMAN, for defendants.

TRIPPE, Judge.

The bill filed in the court below presents about the following statement of facts: John Griffith died testate in 1871, leaving four children, William Griffith, Mary Scott, Susan Holland, wife of J. H. Holland, and the wife of plaintiff in

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error. Plaintiff and his wife, who were to receive nothing under the will, intended to caveat the probate thereof. By the will certain land was given in trust for the children of Mrs. Dunnahoo, and all the balance of the estate was left to the other three children. In January, 1872, before any caveat was filed, plaintiff in error entered into an agreement with two of the children, who were legatees, and with Holland, the husband of the third, and who was one of the executors, as follows: "That the will should be set up and executed; that the land received by John B. Dunnahoo from testator, and all the lands willed by deceased to the children of Mrs. Dunnahoo, all the demands held by deceased against said John B. Dunnahoo at the time of his death to be accounted for as the rest of the heirs. All the above named lands to be valued by disinterested persons chosen by said parties; that when the estate of said deceased shall be ready for distribution a calculation shall be made upon the same and paid out to each of the children of said deceased so that each shall receive the same amount of said estate, except Mary Scott, who shall have the land willed to her over and above the rest as is set forth in said will." The bill alleges that this agreement was made in order to settle and forever to put at rest all controversy in reference to said estate and to avoid family broils and litigation, and that all parties acted under it and accepted it as the law to the executors so far as it conflicts with the testator's will. The legatees mentioned in the will, as well as plaintiff, were indebted to testator, and it was the intention of the parties to the agreement that the debts so due by them were to be taken as advancements, and that the same were not to be paid in and then to be distributed, but to be counted as so much against their respective shares. The testator before his death had instituted suit on a note he held against plaintiff, which was pending when the agreement was executed. Plaintiff had a substantial defense against a large portion of this claim, but relying on the agreement, and as he alleges, "he believed and did know that it was to be determined and settled under the agreement," he gave no further attention to the suit against

him. The executors, without his knowledge, at the next term of the court in which said action was pending and which was, in a few weeks after the execution of the agreement, obtained judgment on the debt and had levied the execution issued thereon on his property. The other parties have never been required to pay the debts they owed the estate. A sale has been made by the executors, all the parties in interest purchasing some of the property. Plaintiff bought about \$1,100 00 worth, of which he paid \$600 00, and no payment was required of the other legatees. The executors have instituted suit against him for the balance of his purchase, which is now pending. There are no debts against the estate, which is ready for distribution, and the share coming to plaintiff or his wife is greater than what he owes the estate, and he has often proposed a settlement as provided in the agreement. The bill prays for an injunction against the levy and sale under it, and against the suit pending against plaintiff for the balance due on his purchase at the executors' sale, and that a settlement and accounting be had as provided for by the agreement, and for general relief, etc. The chancellor refused to grant the injunction.

1. It is apparent that the bill was prepared without reference to the act of 1866, or the constitution of 1868, which secure to a married woman, as her separate estate, all property given to, inherited or acquired by her. Had Mrs. Dunnahoo's right or interest in this estate accrued directly under the will, or solely by virtue of her being an heir-at-law, her husband could not assert her rights in his own name, or as a set off against what he may owe the estate, or set up any equity in her to postpone or otherwise affect the collection of what he might owe the estate. Even under the agreement and the facts in the case, he cannot himself, in his name, assert any claim of hers to prevent the collection of the balance of his purchase at the sale by the executors.

2. The agreement provides that when the estate is ready for distribution, it shall be paid out "to each of the children of the deceased." This distinctly recognizes one share as be-

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longing to Mrs. Dunnahoo, and her husband cannot, by a purchase at the sale, secure to himself what belongs to his wife. To affect the set off, so far as it refers to either of their debts, it would be necessary that the wife should be a party, and that proper allegations, if the facts exist to authorize them, should be made. For the same reason, Mrs. Holland, another daughter, should be a party, with such charges as would show that she was bound by the agreement. She did not sign the agreement. It was the act of her husband. It is true he was executor, but her interest under the will was her separate property. That right could not be affected or lessened by the act of her husband without her consent. The letting in of Mrs. Dunnahoo to a share of the estate did diminish Mrs Holland's portion. To bind her by this, or to enforce the execution of the agreement against the executors, she must be a party, and must be shown to be bound by that agreement. The bill not containing all this, it was not error to refuse the injunction so far as it was prayed to restrain the suit now pending against plaintiff.

3, 4. We do not think the rights of the children of Mrs. Dunnahoo, under the will, affect the question or present any difficulty. They are secured by the will, and are not taken away or diminished by the agreement. Certain land is bequeathed to them, and the parties only contracted that the appraised value of it should be deducted from the share that would go to their mother under the agreement. They have no interest in this contract. But we think the injunction should have been granted restraining the enforcement of the judgment obtained by the executors against the plaintiff. He makes the sworn statement that his defense was, and that it was true, that the debt was for \$100 00 more than it should have been, and that he was entitled to a credit for a payment of \$200 00, and relying on the agreement and the understanding of the parties that a settlement of all the debts was to be made when a distribution was had, he was induced not to prosecute his defense. If this be true, and it is sworn to and not contradicted, he should not lose his right to be heard,

even if the agreement can be repudiated, or cannot be legally enforced. If he was misled by it so as to omit to defend the suit, that right should now be granted him. Two of the three executors signed the agreement. Its terms, when taken in connection with the charges in the bill, are sufficient to entitle him to a hearing before a jury. We do not say that in the present state of the bill he can assert any claim to have this debt paid out of any part of the estate. As before stated, it would be necessary for Mrs. Holland to be a party, as also Mrs. Dunnahoo, with such further averments as might be necessary. It is true a wife cannot dispose of her property to discharge her husband's debts; but in this case, Mrs. Dunnahoo took nothing by the will. She had no property in the estate outside of the agreement. She and her husband proposed to contest the will. All her rights and all chance for any share, would thus have been in litigation. We do not think that, in such a case, a wife should be denied the privilege to compromise a litigated or doubtful claim, even on the terms that she will receive a debt on her husband as part of the share that the other parties may yield to her. Such a settlement is not in conflict with the law, and might be eminently prudent and proper in such cases, especially where family disputes are thereby prevented and settled. We were urged in the argument to give directions as to what rights the plaintiff might have under proper amendments, and what judgment the chancellor should render in the case thus made. But we cannot go farther than the suggestions which have been made, and which necessarily spring out of the reasons given for the decision we render. It is for the parties to take such steps as their interests may require and the law will permit.

In our opinion, the injunction should be granted, so far as to restrain the collection of the judgment obtained by the executors against plaintiff in error, until it can be determined on a final hearing whether he is entitled to be heard on his defense against the note on which the judgment was rendered.

Judgment reversed.

Butler *vs.* Ambrose.

WILLIAM C. BUTLER, plaintiff in error, *vs.* MARTHA E. AMBROSE, administratrix, defendant in error.

1. A showing for a continuance, on the ground of the absence of a witness by whom the party will "sustain his plea," is not, if objected to, sufficiently certain.
2. This court will not grant a new trial on the ground of error in the judge in refusing a continuance if it appear, during the progress of the trial, that the witness for whose absence the continuance was sought was immaterial.

Continuance. New trial. Before Judge HILL. Jones Superior Court. October Term, 1873.

Martha E. Ambrose, as administratrix upon the estate of Warren Ambrose, deceased, brought complaint against William C. Butler on a note dated January 30th, 1856, due on the day of its date, for \$264 13. The defendant pleaded set-off, the statute of limitations and release. When the case was called, the defendant moved for a continuance, and showed, for cause, as follows:

That he had a material witness absent, Dr. S. M. Anderson; that the witness resided in the county, about sixteen miles from the court-house; that he had been subpoenaed, and was not absent by the consent or procurement of the defendant or his counsel; that, as it was then early in the morning, he had not had time to reach court; that the defendant had seen the witness on the previous evening, and had been assured by him that he would be in court on the following morning; that his evidence was important, as he was the only person by whom the defendant could prove the defense made by his plea, and therefore could not safely go to trial without him.

The motion was overruled, and the defendant excepted.

The plaintiff introduced the note sued on and closed. The defendant proposed to read, in support of his plea of release, the evidence of the absent witness given in upon a former trial of the same case, contained in the brief of evidence as agreed upon and filed in the clerk's office, on a motion for a

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new trial. The court refused to admit the evidence, and the defendant excepted.

The defendant then proposed to prove by his own evidence what said witness had sworn upon said former trial. This the court refused to permit, and he excepted.

The evidence of the absent witness, of which the defendant sought to avail himself, was as follows:

"He knew Warren Ambrose; heard Mr. Ambrose say, in a conversation, in 1862 or 1863, that defendant, Butler, had offered to pay him his note; that he told him he did not need the money, for him (defendant) to keep it and buy him a negro with it; he heard Mr. Ambrose also say, in 1865, in March or April, that he did not intend to collect the money of defendant on his note; that defendant had been his friend and had transacted business with him for fifteen years, and had done him many favors; that he told witness that he had told Butler he did not intend to make him pay the notes for he had rendered him many services. Witness married a cousin of Butler's wife; Butler is no relation of Mr. Ambrose; Mr. Ambrose was of feeble health and bed-ridden when he spoke of the matter in 1865; a guardian was appointed for him by the court of ordinary of Jasper county, in the spring of 1865; he spoke of no particular paper he held against Butler; he said paper or papers; witness thought Mr. Ambrose was rational when he spoke of the matter in 1865."

The jury found for the plaintiff. Error is assigned upon each of the aforesaid grounds of exception.

JAMES H. BLOUNT; S. D. IRVIN, by R. H. CLARK, for plaintiff in error.

C. L. BARTLETT, for defendant.

McCAY, Judge.

1. That a witness will sustain the plea is a very unsatisfactory statement of what he will say. The plea is that the plaintiff's intestate had released the defendant from the pay-

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ment of the note sued on. How? Where? When? On what consideration? The thing stated, that he will sustain the plea is a mere conclusion of law. Such a statement of the witness evidently ought to be made so that the court can judge that it will sustain the plea. We think there was no abuse of the discretion of the court in refusing this continuance. That the witness was a practicing physician, whilst it may not of itself be a good ground to refuse, is yet an element to be considered; the defendant could have taken his interrogatories, and is thus guilty of additional *laches*.

2. It would be, we think, trifling with justice to send this case back. The evidence of the witness, taken on a former trial, is part of the record, and was offered in testimony and rejected, we think properly, by the court. From that testimony it is plain that the witness would not have supported the plea. The release, as he states it, was a *nudum pactum*, and never acted upon or executed, and this very case shows the wisdom of the ruling of the judge that it is not enough to say that the witness will sustain the plea.

Judgment affirmed.

**THE MANUFACTURERS' BANK OF MACON, plaintiff in error,
vs. W. L. & HAYNE ELLIS, defendants in error.**

1. Under the charter of the Manufacturers' Bank of Macon, it had no authority, in the year 1862, to issue bills intended to be redeemed in Confederate treasury notes, and therefore the ordinance of 1865 is inapplicable to such contracts.
2. The bills sued on in this case were issued prior to the passage of the act of November 29th, 1862, authorizing the suspension of specie payment by the banks upon certain conditions, and therefore the defendant can derive no benefit from it.
3. To make a contract illegal as being in aid of the rebellion, as provided by the 17th section of the Vth article of the constitution of this state, it should be alleged with whom the contract was made, and the terms of it, and that it was made with the intention and for the purpose of aiding and encouraging the rebellion, and the consideration therefor

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should be alleged, so that the court could determine from the facts whether the contract was made with the intention and for the purpose of aiding the rebellion.

Banks. Scaling ordinance. Constitutional law. Contracts. Pleading. Before Judge HILL. Bibb Superior Court. April Term, 1873.

For the facts of this case, see the decision.

LANIER & ANDERSON, for plaintiff in error.

A. O. BACON; A. T. AKERMAN, representing the same principles in other cases, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant to recover the amount of certain described bank bills issued by the defendant, payable to bearer, a part of which were issued before the war, and the other part thereof, were issued in May and June, 1862. The defendant filed two pleas, alleging that the bills issued in 1862 were issued and used as Confederate currency, and in aid of the Confederate government, in the war between it and the United States, and were illegally issued. That the bills issued in 1862 were intended, and universally understood, to be payable in Confederate treasury notes, and should be scaled under the ordinance of 1865. The plaintiffs demurred to the plaintiff's pleas. The court sustained the demurrer, and defendant excepted.

1. The questions involved in the defendant's pleas were decided by this court in the case of the *Manufacturers' Bank of Macon vs. Lamar*, 46 *Georgia Reports*, 563. But we have been requested by the plaintiffs in error to review that decision in view of the provisions of the act of 1862. In addition to the reasons given for the judgment of the court in that case we would remark that the act incorporating the defendant and authorizing it to issue bills, was passed on the 23d

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day of February, 1850. When the defendant accepted that charter it was bound by the terms of it, and all bills issued by it were issued by the authority of that charter, the same being a contract between it and the state. The defendant had no authority to issue bills in 1862 under any other charter but that, and there can be no pretense that in the exercise of the franchise and privileges granted to it by that charter in issuing bills in 1862, that it was aiding the rebellion, and when it assumes by its plea that it has done so, it repudiates the validity of a public law of the state, to which it owes its existence.

2. The act of 29th November, 1862, did nothing more than relieve the defendant from the penalty incurred by refusing to redeem its bills in gold and silver, upon certain terms and conditions, one of which was that it should receive treasury notes of the state of Georgia, and of the Confederate States, and bills of all solvent banks, in payment of all dues, and upon deposit at par value. The General Assembly said to the defendant if it carried on its banking business as authorized by its charter without redeeming its bills in specie and be relieved from the penalties incurred, it must do certain things, but there is nothing in the act of 1862 which authorized or required the defendant to issue bills under its charter payable in Confederate money, or in any other currency than gold and silver. But the bills now sued on, which were issued in 1862, were issued by the defendant in May and June of that year, before the act of 29th of November, 1862, was passed. The bills were issued by the defendant and put into circulation as money, under the authority of a public law of the State, enacted in 1850, and in pursuance of a contract made with the State for that purpose, and there is no legal ground for saying that the bills were issued in aid of the rebellion, and it does not become the defendant to so allege in the face of that public law which created it, and from which it derives its existence.

3. It is true the defendant might have made an illegal contract, and have consummated it in the payment of its bills as

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the consideration therefor, but the payment of the consideration in its own bills, which it had lawful authority to issue, would not on that account have made the contract any more illegal than if the consideration had been paid by it in the bills of any other bank authorized to issue its bills as money.

What was the contract between the defendant and the party who received its bills now sued on, and the consideration of that contract? Who was the party making that contract? What was the intention of the parties to that contract? What was the consideration received by the defendant for its bills now sued on at the time it paid them out? It is not sufficient for the defendant to allege, in general terms, that the bills sued on were issued and used as Confederate currency, in aid of the Confederate government, in the war between it and the United States, and that many of said bills were actually furnished by said bank to agents of the Confederate government in exchange for Confederate treasury notes to enable the latter to pay off persons in the employment of the government of the Confederate States, and to make change for that purpose. To make a contract illegal, as being in aid of the rebellion, as provided by the 17th section of the Vth article of the constitution of this state, it should be alleged with whom the contract was made, and the terms of it, and that it was made with the intention and for the purpose of aiding and encouraging the rebellion, and the consideration therefor should have been alleged, so that the court could determine, from the facts alleged, whether the contract was made with the intention and for the purpose of aiding the rebellion. The bills sued on, which were issued by the defendant in 1862, as has been already stated, were issued under a charter granted by the state to the defendant, whereby the defendant was authorized to issue bills and circulate the same as money, on the terms and conditions specified therein. The bills of the defendant were issued and put in circulation in pursuance of the contract made by the defendant with the state when it accepted the terms of its charter. When the defendant issued the bills in question, it exercised one of the franchises which its

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charter conferred upon it. The bills were not, and could not have been, payable in Confederate money. The plea does not allege with whom the contract was made by defendant when it paid out the bills sued on, or what was the consideration which the defendant received for the bills, or the value thereof, even if a contract made by the defendant with the state in 1850, to redeem its bills in gold and silver, could be scaled under the ordinance of 1865.

In this case, the defendant cannot derive any assistance from the act of 29th of November, 1862, because the bills were issued some months before the passage of that act. Whilst we know that human tribunals are not infallible, and have no power to make parties satisfied with the judgments thereof, (which would be entirely ineffectual if they had, when the judgment is against a party,) still this court has the power and authority, under the constitution and laws of the state, not to compel parties to be *satisfied*, but to compel them to *acquiesce* in its judgments when made on full consideration of the questions involved therein.

Let the judgment of the court below be affirmed.

JAMES M. SMITH, governor, plaintiff in error, *vs.* BENJAMIN F. KITCHENS *et al.*, defendants in error.

When A was arrested on a charge of assault with intent to murder, and gave bond to appear at the superior court to answer, etc., and upon the finding of a true bill, the judge issued a bench warrant, under which A was arrested and continued in the custody of the sheriff until the trial, during the progress of which he escaped from the custody of the sheriff:

Held, that the securities of the bond taken by the magistrate were discharged by the subsequent arrest under the bench warrant, and are not liable on their bond.

Criminal law. Recognizance. Bail. Before Judge HERSCHEL V. JOHNSON. Glasscock Superior Court. August Term, 1873.

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This case arose upon a *scire facias* to forfeit a bond executed by Benjamin F. Kitchens, principal, and John F. M. Kitchens and William F. Kitchens, securities, conditioned as follows: "The condition of this recognizance is such that if the above bound Benjamin F. Kitchens shall personally appear at the next superior court to be held in and for said county of Glasscock, to be held on the third Monday in August next, to answer to such matters as shall then and there be charged against him by Joseph Kitchens, of said county, concerning the lying in ambush and attempting his life by trying to burst caps upon a loaded gun, and if he do not depart thence without leave of the court, then this recognizance to be void, else to remain in full force and virtue."

The facts were as follows: Benjamin F. Kitchens was arrested and carried before W. C. Langham, a magistrate, charged with the offense of an assault with intent to commit murder. After a preliminary trial, he was admitted to bail upon giving the bond above referred to. At the next term of the superior court, a true bill was found against him, and he was arrested under a bench warrant. He remained in the custody of the sheriff until he escaped by walking out of the court-room while his trial was progressing. No *exoneretur* was entered upon the minutes of the court. The principal was not delivered by his securities into the hands of the sheriff.

The aforesaid facts were set up by the securities in response to the *scire facias*. The *scire facias* was dismissed, and the plaintiff in error excepted.

JOHN W. ROBINSON, Solicitor General, by B. H. HILL & SON, for the plaintiff in error.

TWIGGS & WRIGHT, for the defendants.

MCCAY, Judge.

We think the court below was right in holding these securities discharged. It would be a very bad public policy to treat the bond given by the defendant before a magistrate, as

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inhibiting the judge of the superior court, either after or before indictment, from ordering the re-arrest of the defendant. These bonds are often taken without due consideration, and ought to be subject to the reconsideration of the matter by the judge. The case quoted from Texas seems at first sight very much in point, but it will be noticed that the new process was issued by the clerk. Here, after indictment found, the judge issues a bench warrant over his own signature and seal, ordering an arrest. That arrest was made, the party was in the custody of the sheriff, and escaped. It would, as it seems to us, be an outrage to charge the original securities with this escape. He was in the lawful custody of the sheriff. The securities could not control him. He was held by the sheriff for this very crime. We are not prepared to say this second arrest was illegal. We must do that to hold these securities liable, since if it was legal the state had, by its own lawful act taken the defendant out of the custody of the securities, to hold him for the very same offense. The course pursued in this case is the common practice in the state, and has been for many years. Especially after indictment found, the judge of the court where the indictment is, orders the re-arrest of one under bail, at his discretion. As we have said, it is a very proper thing often for the judge to do, and if such a power did not exist, it would be a great defect in our criminal law.

Judgment affirmed.

LAURENT DEGIVE, plaintiff in error, *vs.* MEADOR & TUMLIN, defendants in error.

1. When a suit is pending in favor of a mechanic, under sections 1963 and 1964 of the Revised Code, and the property on which the lien is claimed to attach has been sold by virtue of a legal process, the purchaser cannot make himself a party to such action and tender an issue denying the character in which plaintiff brings his suit.

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2. The fact that such purchaser has a mortgage on the property does not affect the question.
3. The sale of the property discharged it from the mechanics' lien, if it existed, and all questions touching the priority or validity of the conflicting liens can, as between contesting creditors, be determined on the hearing of a rule for the distribution of the proceeds of the sale.

Mechanics' lien. Mortgage. Party. Judicial sale. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

Meador & Tumlin brought suit to the October term, 1867, of Fulton superior court, against the Masonic Hall Company of Atlanta, a corporation, for \$2,590 40, on an account for cutting, preparing and furnishing stone, and putting up granite front on the masonic hall building. They alleged that the work was completed according to contract on the 1st day of May, 1867, and accepted by the president of the corporation. The declaration did not allege that the plaintiffs were mechanics or stone-cutters, but simply that the defendant was indebted to them in the sum named for the work specified. The declaration further recited that "the petitioners had filed their mechanics' lien in terms of the law," and prays process, etc. A judgment was rendered for the plaintiffs, and an appeal entered by the defendant, at the April term, 1868.

While the cause was pending on the appeal, to-wit: on the 11th of April, 1872, Laurent DeGive filed a plea, under oath, setting up that he was the owner of the property upon which the lien was claimed, and that the property was not subject to the lien because Meador & Tumlin were neither stone-cutters nor mechanics, as contemplated by the statute, and did not cut and put up the stone on the said building as described, nor any part of it.

When the case was called for trial DeGive appeared by his attorney and offered to defend the suit, stating and offering to prove the following facts: That he was the original owner of the masonic hall property on which said lien was levied and had sold it to the Masonic Hall Company on time for \$10,000 in gold, making, at the time of sale, a deed to said company

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and taking from them a mortgage to secure the purchase money, that before said purchase money was paid or any part of it, the said company proceeded to build a masonic hall on the property and partially completed the same; that in October, 1869, the property was seized and sold under a mechanics' lien *fi. fa.* in favor of Healy & Berry *vs.* The Masonic Hall Company for work done by them for said company upon said property; that he became the purchaser at that sale for the price of \$21,000 00 and proceeded to improve the property at the cost of about \$40,000 00; that the principal and interest due him for the purchase money of the property upon his mortgage, and the legal liens thereon, amounted to more than \$21,000 00 not including the demand of Meador & Tumlin from which he was therefore seeking to protect himself believing, for the reasons stated in his plea, that the plaintiffs had no lien under the law.

Counsel for plaintiffs objected to DeGive's being heard because not a party to the suit. Counsel for DeGive then moved the court to allow him to be made a party defendant. The court refused to permit him to be heard as to the facts aforesaid, or to be made a party, and allowed the plaintiff's counsel to take an order dismissing the appeal, they producing an authority from the Masonic Hall Company to that effect.

DeGive excepted to all of these rulings and assigns error thereon.

D. F. & W. R. HAMMOND; COLLIER & COLLIER, for plaintiff in error.

We insist that DeGive, who was the owner of the property in this case, and the principal creditor of the defendants, out of whom the fund had been raised for distribution, had the right to show that the lien of Meador & Tumlin was not a valid and subsisting lien, and that the court erred in refusing him this privilege: Code, section 3484; 45 Ga., 493; 45 *Ibid.*, 97.

We insist that the vendor's lien, under the law, is paramount to that of the mechanic, or any other lien, until the

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property is paid for. But while this is true, DeGive having sold and made a deed, and taken a mortgage to secure the payment, and being before the court in a contest as to the superiority of liens, he had such an interest in the case as entitled him to a hearing : 29 Ga., 408 ; Code, 3654 ; 22 Ga., 116 ; 40 *Ibid.*, 259 ; Code, secs. 1994, 1959.

ROBERT BAUGH ; A. W. HAMMOND & SON, for defendants.

None but parties to record can be heard : 19 Ga. R., 15. Stone-cutters have mechanics' lien : Acts of 1859, p. 57. Purchasers not affected by this judgment : Code, section 1990, par. 3.

TRIPPE, Judge.

1. There can be no legal necessity, in order to assert any right of plaintiff in error, that he should be made a party to the suit he proposed to defend. He has purchased the property at a sale under a legal process, and by section 1961, Revised Code, takes it discharged of the mechanics' lien, and if any lien may exist it can only attach to the proceeds of the sale upon notice of the mechanic to the officer who sold the property, to hold the money to be disposed of by the superior court. It may be that the defendants in error desire a general judgment against their debtor as well as one for their lien, which we have held at this term they can obtain : *Parish vs. Murphy*, decided at this term. They should not be postponed in obtaining this by a third party on the mere ground that he has become the purchaser of the property on which the lien is claimed. He can defend himself if an attack be made upon him or his property.

2. It does not clearly appear what precisely is the object of DeGive in asking to be allowed to defend against the suit of Meador & Tumlin. If it be because he wishes to protect his title, we have seen there is no danger to that. If it be that notice has been given by Meador & Tumlin to the officer to hold the money arising from the sale at which DeGive pur-

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chased the property, and that there will be a contest by conflicting liens over the fund, it does not so appear from the record. So far as the record discloses, the proceeds may have been already distributed. The fact that DeGive holds the mortgage does not affect the case, for if the money is already distributed there is nothing over which the contest can arise, neither title or money. And if the proceeds of the sale are yet to be distributed by the court, and the mechanics' lien and the mortgage lien come in conflict, the court doubtless will open the door wide enough to let the rights of all the parties be heard, contested and adjudicated. DeGive would have all the rights on that issue that he could have in the one he proposes now to make.

3. The sale of the property discharged it from the mechanics' lien if it existed, under the section of the Code quoted, and all questions touching the priority or validity of conflicting liens can, as between contesting creditors, be determined on the hearing of a rule for the distribution of the money arising from the sale.

Judgment affirmed.

ABRAM SEBORN *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

1. On a charge of assault with intent to murder, if the assault be not under such circumstances as if death had ensued, it would have been murder, it is illegal to convict the defendants of assault with intent to murder.
2. When three persons are tried together for assault with intent to murder and are found guilty, a new trial may, in this state, be granted as to one or more of the defendants, and the verdict stand as to the others.

Criminal law. Assault with intent to murder. New trial. Before Judge SCHLEY. Screven Superior Court. November Term, 1872.

Abram Seborn, Ned Seborn and Sarah Seborn were placed upon trial for the offense of an assault with intent to commit murder, alleged to have been committed upon the person of Joe Lambert, on August 3d, 1871. The defendants pleaded not guilty.

The evidence for the state made the following case: On the day alleged in the declaration, Joe Lambert was passing down a road in Screven county with his ox cart, when he was hailed by Abram Seborn, who wanted to know about "some tales he had heard." He said whoever had insulted him, white man or black man, he had bought a pistol with which to kill him. Lambert replied that he "did say so," when Abram wheeled and shot him through the arm. Lambert caught hold of a rail and struck him. Ned Seborn, the father of Abram and Sarah, told Abram to kill him. Sarah ran up and struck him on the head with a rail. Lambert then caught Abram and Ned and held them down until they succeeded in getting up and running off. Abram turned and shot him through the thigh. Lambert then went off in his cart. He fainted when the doctor cut the ball out. He had passed the parties about one hundred yards when Abram hailed him. They were over the fence, in the field. He did not go into the field until he was shot the first time. Followed Abram about three hundred yards into the field, trying to reach him before he could cock his pistol. Ned said, after the difficulty, that he wished he had killed Lambert; that he would have been justified in so doing.

The three defendants were introduced as witnesses, it is supposed, by consent, to avoid a severance. They testified substantially as follows:

Lambert was passing along the road when Abram hailed him and said he wanted to see him about some news he had heard. He admitted "the news," and immediately jumped into the field and jerked a rail off the fence, swearing that he would kill Abram or Abram must kill him. Abram walked off ten steps, drew his pistol, and told him to stay off. He

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said, "I kill you to-day or you kill me," and knocked Abram down on his knees with the rail, when the latter fired, shooting him through the arm. Before Abram could get up, he threw down the rail and jumped on him. In this condition of affairs, Sarah hit Lambert with a rail. Ned came up and told Abram to "take away his pistol." He "took away his pistol," got up and ran off about fifty yards, Lambert following him with a rail. Ned said, "do you run, and a man trying to kill you? Shoot him again." Lambert still followed him between four or five hundred yards to Ned's house, when he fired the second time. Abram carried his pistol to shoot rabbits. When Ned came up to the combatants, Lambert said to him, "where are you going, you old devil; for if you come any nearer, I will kill you or Abram." The rail with which Sarah struck Lambert was the same one used by the latter in knocking Abram down. Ned told her to knock him again, for he would kill her father or brother.

The jury found the defendants guilty of an assault with intent to murder. They moved for a new trial, because the verdict was contrary to the law, and the evidence. The motion was overruled, and defendants excepted.

W. HOBBY; J. L. SINGLETON, by HILLIARD & HARRISON, for plaintiffs in error.

JOHN W. ROBINSON, Solicitor General, by B. H. HILL & SON, for the state.

McCAY, Judge.

1. There is no good objection to this verdict as to Abram. If the jury believed the state's witness, he was guilty. But taking his whole testimony with the other testimony, we think there is no sufficient evidence of assault with intent to murder against the others. To make out this offense it must appear that had the assault caused the death of the person assaulted, it would have been murder. The evidence of the principal witness would at first seem to implicate all the defendants in

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the attack on him in the lane. But if it be looked at critically, it will appear that his statements on this point are not definite. He does state that they encouraged and aided Abram, but he does not state the time of their interference; and taking the statements of the other witnesses, especially the evidence of the track of the blood, it would appear that after the attack in the lane and the shooting, then Lambert got over the fence, followed Abram with a rail in his hand, and did his best to commit serious hurt upon him, and that it was during his pursuit of Abram that the old man and the girl interfered and committed the assaults he testifies to. We can excuse him for the anger which led him thus to push the war upon his foe. A man with lead in him from the pistol of an adversary may be excused, at least, if in the passion thus begat, he fails to stand only on his own defense. But the law does not *justify* such acts, and when he crossed the fence, following Abram through his own field with a murderous weapon, endeavoring to strike him, he was himself violating the law. The same charity which excuses him for the anger caused by the wound inflicted on him, will, however, also excuse the old man and the girl for aiding their son and brother when his life was in danger from the anger and the rail of the prosecutor. Abram was retreating. He had got over the fence, got off some one hundred yards, the state's witness, Lambert, was after him hot with rage, and with an instrument of death in his hands. It cannot be fairly said that it was with murderous intent that the old man and the girl interfered. They had a right to interfere at that stage. Lambert had become a wrongdoer, and what they did would not have been murder. Even Abram had a right to turn upon his pursuer, and had he then killed Lambert it would not have been murder. We think, therefore, the verdict as to the old man and the girl is illegal.

2. But it ought to stand against Abram. Under our system of criminal law the principal of severance in all criminal trials is the general rule. There is no reason in the nature of things why the verdict, though set aside as to the two, should not

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stand as to the one really guilty. Perhaps by the common law this could not be done. Its strict rules of pleading and adherence to a theoretical accuracy in such matters, though much admired by some, is modified by our law, and we think the modification justifies the disposition we make of this case.

Judgment affirmed as to Abram, and reversed as to Ned and Sarah. *+*

JESSE J. BRADFORD, plaintiff in error, *vs.* **PETER PREER *et al.***, defendants in error.

A writ of error does not lie to this court from the judgment of a county court.

Practice in the Supreme Court. Bill of exceptions. Jurisdiction. Before the Supreme Court. January Term, 1874.

For the facts of this case, see the decision.

J. F. POU; BLANDFORD & CRAWFORD; R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON; JAMES M. RUSSELL, for defendants.

WARNER, Chief Justice.

This is a writ of error from the county court of Muscogee county, and the only question made here is whether a writ of error can be brought to this court from the decision and judgment of a county court. By the constitution, the supreme court has jurisdiction alone for the trial and correction of errors from the superior courts, and from the city courts of Savannah and Augusta, and such other like courts as may be hereafter established in other cities; that is to say, such courts as may be established in other cities, organized in the manner, with the same powers and jurisdiction, like the city

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courts of Savannah and Augusta. The county court of Muscogee county is not such a court as is contemplated by the constitution.

Let the writ of error be dismissed for want of jurisdiction in this court to hear it.

PATRICK Z. ROACH, plaintiff in error, *vs.* HENRY SULTER, defendant in error.

A writ of error does not lie to this court from the city court of Savannah to set aside a verdict of a jury, either because it is contrary to the evidence or because it is not such a verdict as the jury might lawfully render under the pleadings. A writ of error only lies from the decision, sentence or decree of the court.

Practice in the Supreme Court. Before the Supreme Court. January Term, 1874.

Roach, without having made any motion for a new trial, brought the above stated case to this court upon the following assignments of error :

- 1st. Because the verdict is contrary to law.
- 2d. Because the verdict is contrary to evidence.
- 3d. Because the verdict is contrary to the charge of the court.
- 4th. Because the jury found for the plaintiff generally, without specifying upon which of the counts contained in the declaration they based their verdict, there being no evidence to sustain the first count, and counsel for the plaintiff having stated to the court and jury that he relied upon the second count only.

Counsel for Sulter moved to dismiss the writ of error because the court could not pass upon the verdict of a jury in the absence of a motion for a new trial. The court sustained the motion in the decision which follows.

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JOHN M. GUERARD, by brief, for plaintiff in error.

Could not obtain new trial in the city court of Savannah, because its organic law is like that of the city court of Atlanta: Tate *vs.* The State, 48 Georgia Reports, 37. It is only when a new trial is not moved for in a court able to grant it that this court will not revise a verdict, but "*cessante ratione, cessat et ipsa lex.*"

THOMAS R. MILLS, JR., for defendant.

1st. Writ of error lies only from judgment, sentence, or decree of a court: See Code, section 4250.

2d. To correct error of fact or verdict of a jury, remedy is generally by motion for new trial, or by writ of *certiorari* (never by writ of error:) See Code, section 3717.

3d. City court of Savannah can grant new trials, and the case of Tate *vs.* The State does not apply. If the power cannot be derived from the city court law, (Code, sections 4923 and 4932 and the constitution of Georgia, Code, section 5086,) still the right seems to be expressly conferred by acts of 1865 and 1866, page 46: See Code, section 4266. Power can be derived from city court law and constitution of Georgia: See decision of Judge Chisholm, Murphy & Clark *vs.* B. J. Wilson, May term, 1869. The supreme court has acquiesced in the jurisdiction of the city court of Savannah to grant new trials: See Beckford & Holman *vs.* Chipman, 44 Ga., 545.

4th. But if want of power to grant new trials deprive parties of right of being heard on questions of evidence by writ of error, it is for the *legislature* to legislate a remedy into existence: See Tate *vs.* The State, 48 Ga., 38.

5th. But the party is not without remedy. For errors of law, he has writ of error; for error of fact, he has writ of *certiorari* to superior court and other remedies: See 48 Ga., 38. The supreme court has frequently decided that it will not, *under a writ of error*, review the findings of a jury: See Code, section 5086, McRae *vs.* Adams, 36 Ga.; 442; Fish *vs.* Van Winkle, 34 Ga., 339; Ellington *vs.* Coleman, 34 Ga., 425.

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McCAY, Judge.

Whether the city court of Savannah can grant a new trial upon the evidence from the verdict of a jury, is not in this record, and we do not pass upon it, though we see no reason to change the opinion we expressed in the case as to whether the city court of Atlanta had this power. In our judgment it is a questionable power at any rate. Why should the judgment of twelve men be subject to be reversed by the judgment of one man? The jurisdiction of the city court is limited to \$1,000 00. No great interests are at stake in leaving the final judgment in such a case upon the facts to a jury. They are very apt to be right. Even in this case, however wrong they may be as to form they have done very fair justice. Perhaps the verdict may be illegal because not in the alternative. But if so, a motion should have been made to set it aside for that reason. This court has no original jurisdiction. Its power is only to review the decision, sentence or decree of the court, and until the court has passed upon a matter we have no power over it. Even in the case of a verdict of a jury in the superior court, this court has only jurisdiction by action on the judgment of the court in setting it aside or in refusing to do so.

Judgment affirmed.

WILLIAM L. WOODALL *et al.*, plaintiffs in error, *vs.* JAMES M. SMITH, governor, defendant in error.

The advice given by the solicitor-general to the security on the recognizance to have the principals in court as soon as he could get them there, with the assurance that the judgment of forfeiture would not be entered until next morning, may have misled the security so as not to have applied to the court for indulgence until next day, or to employ counsel for that purpose; and this, with the fact that the security did have the principals in court by the jury hour next morning, and so announced to the court, was sufficient to authorize the setting aside the judgment of forfeiture, although it had then been entered on the minutea.

Woodall *et al. vs. Smith.*

Criminal law. Bail. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

Two indictments were pending against William L. Woodall and Priscilla Bacon, for adultery and fornication. Bonds for the appearance of the defendants were given, each in the sum of \$500 00, with Godfred Kener as security. The defendants failed to appear, and a *scire facias* was issued in each case, requiring the security to show cause why his bond should not be forfeited. These cases were called late in the evening, and no cause being shown to the contrary, rules absolute were taken. On the succeeding morning, by the arrival of the hour for jury business, but after the orders taken on the previous evening had been entered on the minutes, the security produced his principals in court, and, with them, moved that the judgments of forfeiture be set aside on account of his having been misled by the solicitor general.

It was then made to appear by the statement of the solicitor general that he did not promise the security on the previous evening that he should have an opportunity to show cause on the next morning why said bonds should not be forfeited; that when said cases were called, the security asked him what he should do; that he replied that the best he could do would be to have the defendants in court as soon as he could get them there, and that he would not enter the judgments until the next morning; that this occurred just after the court allowed the orders forfeiting the recognizances, and immediately before it adjourned for the day.

It further appeared that the security, with a bailiff, proceeded to the residence of the defendants at daybreak on the succeeding morning, and produced them in court with the utmost diligence. The motion was overruled, and movants excepted.

B. H. BIGHAM; SPEER & SPEER, for plaintiffs in error.

A. H. Cox, solicitor general, for defendant.

TRIPPE, Judge.

When the case was called, which was the last thing done that afternoon, and the court told the solicitor general he could take a judgment of forfeiture, the security on the bail bond asked the solicitor "what he should do," and he replied to him that "the best thing he could do would be to have the defendants in court as soon as he could get them there, and that he then told him he would not enter the judgment forfeiting the recognizance until the next morning." No application was made to the court. The security swears, that acting on these statements of the solicitor general, he started by day-break the next morning with an officer, and by the time jury hours had arrived had both defendants in court. As soon as the attention of the court could be had, the fact that defendants were present to submit to trial was announced. The order of forfeiture having by this time been prepared and entered on the minutes, a motion was immediately made to set aside the judgment. This the court refused. The security had the right, when the case was called, to ask time of the court until next morning, to have his principals present. It was the last case called that afternoon, and the court adjourned after announcing that the solicitor general could take the judgment of forfeiture. What the solicitor said to the security made it unnecessary for that application to have been made to the court. What the court would have then done we cannot say. It had a discretion in the premises, and the security may have been induced, by what the solicitor general said, not to appeal to that discretion, or to have obtained counsel to do so for him. He followed the suggestions made by the state's attorney, and did what he was advised to do. He had the right to believe if he brought the defendants into court by the next morning, the final forfeiture would be saved. He did so. He paid all the price that was asked, and the state, by that act, had at its command two persons charged as criminals by the grand jury. We do not think that it would be a precedent inviting *laches* or delay on the part of defend-

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ants to allow a security, under these facts, to have the forfeiture of his bond opened. There were other facts not herein mentioned which might have operated on the court to have allowed the security until the next morning, had his discretion been first appealed to. It is more than probable that that right was lost to the security by what passed between him and the solicitor general.

Judgment reversed.

JAMES CREIGHTON, plaintiff in error, *vs.* WILSON C. HEWITT, defendant in error.

The verdict in this case is fully sustained by the evidence, and the credibility of the witnesses being especially for the consideration of the jury, a new trial ought not to have been granted.

New trial. Before Judge GOULD. City Court of Augusta. May Term, 1873.

Creighton brought trespass against Hewitt for \$1,000 00 damages. The defendant pleaded the general issue. The evidence was, in substance, as follows :

James Creighton, the plaintiff, says : The goods named in the declaration, consisting of clothes, jewelry and money, were left in his room, at the Globe hotel, in the city of Augusta, on or about the 9th of May, 1869, aggregating in value about \$700 00. The defendant was the proprietor of said hotel. The door of his room was locked, and no one had keys to it except the defendant and the chambermaids. Plaintiff was the steward of the hotel. On the day above stated he went out into the city on business, became sick and went to his home on Greene street, fell asleep, and not waking until late in the evening did not return to the hotel until the next morning. Policeman Welch informed him that his trunk had been robbed, and was at the police station. Accompanied the policeman to the court-house where the trunk was, and thence to the

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hotel. The officer told him to be cautious. Went with him to the room, and found all the property gone. Talked to the defendant when plaintiff came down, asked him for his property, and endeavored to explain his absence. The defendant seemed to be mad and would pay no attention to him. The defendant paid him \$60 00 and his board per month, for his services. Never had any difficulty with the defendant prior to this. Left the hotel without provocation from the defendant, and without his knowledge or consent. Was bound to be at his post, though there were times when he could take an hour or so to go out on the street. Took the keys of the store-room, pantry and of his own room off in his pocket. The defendant had a pass-key to every room in the house. Shortly after his clothes were taken saw some of them in the privy of the hotel.

Louisa Lovell says: Was passing down Ellis street in the night, some years ago, and as she passed the back-gate leading out of the yard of the Globe hotel, saw the defendant open the gate and put out a yellow colored trunk into the street. This was about eleven or twelve o'clock at night.

Joseph Reynolds says: Was a policeman in the year 1869. On the night of the 9th or 10th of May, of that year, at a little before twelve o'clock, found a trunk on Ellis street, in the rear of the Globe hotel. Don't know who put it there. Found by some letters in it that it belonged to the plaintiff. Took it to the police station. It was a brown or yellow colored trunk. It was open.

George Washington says: In the year 1869 the defendant sent for him to clean out the privy of the Globe hotel, and to sink it four feet deeper. In the course of his work found a large bundle in the sink which he took to be the body of some one. Went and brought his drag and pulled up a bundle of clothes larger than he could span with both his arms. Untied it and picked out a silk vest and other clothing. Sent for the defendant and showed him the things. He cursed witness for pulling them out of the sink, pushed them back, and threw in the drag.

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..... Walters says: Was in the defendant's employ as a cook in the year 1869. Saw George Washington picking the clothes out of the sink. Recognized them as belonging to the plaintiff. George was picking them out piece by piece.

Wilson C. Hewitt, the defendant, testified as follows: The plaintiff had been in his employ about two years, when, on the 9th or 10th of May, 1869, the day that the Georgia Railroad convention was in session, on going to his dining room to see if dinner was about ready, found him absent. Immediately got a horse and went in search of him. Heard of him at several places, but did not find him until the succeeding day, when he and the policeman came to the hotel. The conduct of the plaintiff in leaving his hotel in the manner in which he did subjected him to great inconvenience, as his house was filled with guests to the number of three or four hundred. Did not have a pass-key to the plaintiff's room; did not enter his room or remove his trunk therefrom; did nothing with his room on the day after he left; might have put some one there on the following night, as he was very much crowded. Do not know what became of the trunk or its contents; heard some of the servants say that there was a hat and coat floating about in the privy; went back and saw them; the hat he recognized as belonging to the plaintiff; did not know that these were a part of the contents of his trunk. Made no effort to recover the trunk or its contents; the plaintiff did not leave it under his control. His house was not entered by a burglar on the night on which the trunk was taken, unless the plaintiff may be regarded as such.

The jury found for the plaintiff \$704 70, with interest from May 10th, 1869. The defendant moved for a new trial, because the verdict was contrary to the evidence. The motion was sustained, and a new trial ordered; whereupon, the plaintiff excepted.

JOHN S. DAVIDSON; THADDEUS OAKMAN, for plaintiff in error.

JAMES S. HOOK, by SAMUEL F. WEBB, for defendant.

McCAY, Judge.

We do not think this verdict comes within the class of verdicts which the judge of the superior court is authorized to set aside. It is not contrary to the evidence, if the witnesses are to be believed, and under our law the jury are specially the judges of that matter. We will not say that there is no case where the judge may not grant a new trial, when credibility of witnesses is the turning point of the case; but in this case, there seems to be nothing but the simple belief of the judge that the woman who saw Mr. Hewitt did not tell the truth, and the improbability that a man occupying the station in life of the defendant would do so dastardly an act as this. It is clear, however, that somebody did it. It is clear, too, that the defendant was in a rage at the plaintiff, and it is difficult to see how the thing done could have been done except, at least, by the consent of the defendant. Taking all the circumstances together as they appear in the record, we do not think the verdict displays passion, prejudice or mistake, but it is such a verdict as twelve honest, sensible men might well render, though others might differ with them.

Judgment reversed.

RICHARD W. BONNER, guardian, plaintiff in error, *vs.* JAMES W. WOODALL *et al.*, defendants in error.

1. Where a note for money borrowed was given in 1860, with two securities thereto, which was renewed on February 14th, 1868, the name of one of the securities being omitted therefrom with the knowledge and consent of the other security, there was no such novation of the original contract, in the legal sense of the term, either as to the maker or the remaining security, as would bring it within the operation of the ordinance of 1865.
2. Where, by agreement of counsel, a motion for a new trial is to be made and heard in vacation, "provided the same is done in time to take the case to the next July term of the supreme court," and said motion is made and heard in time for such purpose, provided extraor-

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dinary diligence had been used, but the writ of error was, in fact, made returnable to the succeeding January term, a motion to dismiss will not be entertained on this ground. Whatever rights the parties had under the agreement referred to, should have been set up in the court below. (R.)

Novation. Ordinance of 1865. Practice in the Supreme Court. Before Judge HILL. Twiggs Superior Court. April Term, 1873.

When this case was called a motion was made to dismiss the writ of error on the ground that it had not been returned to the last July term of the court, as provided by agreement of counsel and order of court. The facts relied upon to sustain such motion were as follows:

This case was tried at the April term, 1873, of Twiggs superior court. On account of the sickness of W. K. DeGraffenreid, leading counsel for the plaintiff, an agreement of counsel was entered into and an order of court accordingly taken, which allowed a motion for a new trial to be made and heard in vacation, "provided the same is done in time to take the case to the next July term of the supreme court." The motion was subsequently made, and was overruled on June 5th, 1873. The return day to the July term, 1873, of the supreme court was June 17th, 1873. The bill of exceptions was certified to by the judge on June 16th, 1873, and by the clerk on the succeeding day. The papers reached the clerk's office of the supreme court on August 12th, 1873.

The motion was overruled, the court enunciating the principle embraced in the second head-note.

For the facts of the case, upon its merits, see the decision.

WHITTLE & GUSTIN; R. F. LYON, for plaintiff in error.

J. & J. C. RUTHERFORD; S. HALL; RICHARD H. CLARK, for defendants.

WARNER, Chief Justice.

The plaintiff brought his action against the defendants on a promissory note for the sum of \$2,610 37, payable to the plaintiff, as guardian of Harry Dorsy, dated 14th February, 1863, and due 1st day of January, 1864. On the trial of the case, the jury, under the charge of the court, found a verdict against Woodall for the sum of \$560 00, with interest thereon, and the sum of \$146 65, with interest thereon, against Nelson, the security. The evidence in the record substantially discloses the following facts in relation to the consideration of the note sued on : That before the war in 1860, the defendant, Woodall, borrowed of the plaintiff, as guardian, \$2,000 00, in current bank notes issued by the banks of this state, and gave him his note therefor, with Reynolds and Nelson as his securities, that the note sued on was given in renewal of that note, including the interest due thereon, that when the note was renewed Reynolds' name was left out at his request and by plaintiff's consent, he being willing to take Nelson alone as security. The plaintiff wrote the note, gave it to Woodall to sign and to procure the signature of Nelson, which was done, the plaintiff not being present. Nelson knew at the time he signed the last note, as security for Woodall, that it was given in renewal of the first note. There was nothing said at the time as to the kind of currency in which the note should be paid, though Nelson stated in his evidence that he expected, if he had the money to pay, to pay it in Confederate money. The court charged the jury, in substance, that the renewal of the old note, by leaving out Reynolds, under the facts of the case as stated in the evidence, was a novation of the original contract, and would authorize them to scale the note sued on under the ordinance of 1865, to which charge of the court the plaintiff excepted. The original contract between the parties was to pay the plaintiff the \$2,000 00 borrowed of him. The renewed contract was to pay him the same amount, with the lawful interest due thereon, for the same consideration, and there is no pretence that

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there was any other consideration for the renewed note, or that Nelson did not know, at the time he signed the renewed note as security for Woodall, that Reynolds' name was to be left off of it with the plaintiff's consent. One simple contract as to the same matter and on no new consideration, does not destroy another contract between the same parties, but if new parties are introduced by novation so as to change the person to whom the obligation is due, the original contract is at an end: Code, 2724. In this case there was no new consideration for the renewed note, and no change of the person to whom the obligation was due, and if Nelson signed the renewed note as security for Woodall, with full knowledge that Reynolds' name was to be left off of it, then no new parties have been introduced or omitted from the contract of which he has any right to complain. There was no novation of the original contract, in the legal sense of that term, either as to Woodall or Nelson, but a simple renewal of the original contract, and for the same consideration. The note sued on, being simply a renewal of a contract made prior to the 1st of June, 1861, was not subject to be scaled under the provisions of the ordinance of 1865. The consideration of the note was not Confederate money, but bank bills, the purchasing power of which was nearly equal to that of specie at the time it was borrowed of the plaintiff, as the property of his ward, and therefore is not of that class of contracts contemplated by the ordinance of 1865. In our judgment the court erred in its charge to the jury, as set forth in the record.

Let the judgment of the court below be reversed.

JAMES A. GRAY, plaintiff in error, *vs.* HEMAN H. PERRY,
receiver, *et al.*, defendants in error.

1. A bill was filed by various creditors of A, claiming to have liens on his effects, and a receiver was appointed who took the assets into possession and reduced them to money. There was a trial and a verdict

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distributing the money among the liens, but before any formal decree was made and the money paid out, B filed a petition setting up that he was a judgment creditor, having a higher lien than any of the original claimants, and praying that his debt be paid:

Held, that whilst it was not too late for B to come in, as the fund was still under the control of the court, yet the decree of the jury was *prima facie* to be taken for true, and it was not error in the court, B offering no proof to contradict the charges in the bill, to decide the questions of priority according to the face of the record.

2. When a trustee invests trust funds in property in his own name, the *cestui que trust* may elect to follow the *corpus*, and as against a judgment creditor of the trustee, the title of the *cestui que trust* has the preference, especially if the debt of the creditor be in existence at the time of the purchase of the property by the trustee with the trust funds.

Equity. Judgment. Practice in the Superior Court. Trusts. Lien. Before Judge GIBSON. Burke Superior Court. May Term, 1873.

James A. Gray obtained a judgment against Carlton T. Belt, in the superior court of Burke county, on the 27th day of May, 1871, for \$1,000 00, with interest from the 18th of February, 1869, and costs of suit. Execution was issued thereon and placed in the hands of the sheriff with instructions to levy on whatever property he could find. On the 25th day of January, 1872, he levied on about twenty-two bales of cotton in the seed, and was proceeding to advertise and sell the same in terms of the law, when he was told by the attorneys in the Ella J. Belt case, and by the receiver appointed therein, that he was stopped by the injunction, and was thus induced to postpone his proceeding, and afterwards, to-wit: on the 27th day of September, 1872, entered on said *f. fa.* the following: "No property to be found to satisfy the within execution, except trust property."

The following are the facts in the Ella J. Belt case, in which said injunction was granted and said receiver appointed: Ella J. Belt, wife of said Carlton T. Belt, filed a bill against Griffin & Clay, Williams & Company, F. A. Jones, executor of M. D. Jones, and Carlton T. Belt, making the following case: Ella J. Belt, formerly Ella J. Inman, intermarried with said

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Carlton T. Belt on January 6, 1871. At the time of marriage, she was possessed, in her own right, of about one thousand acres of land in Burke county, and of personalty to amount of \$6,700 00. After said marriage she applied to the court and a decree was rendered by which her entire property, real and personal, was set apart as a trust for her sole use, and that of her issue by said marriage, exempt from the debts of her present or any future husband, and said Carlton T. was appointed her trustee, and received possession and control of said property. In January, 1871, said Carlton T. rented, for that year, from F. A. Jones, as executor, aforesaid, the McGruder place, and from said Jones, as guardian for Ernest Corker, the "Corker" place, and for rents therefor, contracted to pay for the first, \$3,200 00, and seven thousand five hundred pounds lint cotton for the latter. Both places were rented by him for his own benefit, and in his own individual right. In preparing to farm, said Carlton T. used all of said trust fund, to-wit: \$6,700 00, by investing it, on his own authority, in horses, mules, wagons and agricultural implements, and with them made the crops during 1871. In farming said plantations he incurred large debts for advances on account thereof, to-wit: about \$3,000 00 with said Griffin & Clay, to whom, as security, he gave a factor's lien on his cotton crop and a mortgage on all his personal property; also, one of about \$15,000 00 with said Williams & Company, to whom he also gave a similar lien and mortgage. He owed said Jones, as aforesaid, \$1,800 00 for balance of unpaid rent, and for an advance on account of said planting business. Griffin & Clay have foreclosed their said lien, and have levied it on thirty bales of cotton grown on the "McGruder" place during 1871, and are about to foreclose on said Carlton T.'s personalty. Williams & Company are about to foreclose their lien and mortgage, and said Jones, executor as aforesaid, claiming that his debt is for rent, is proceeding to collect it by a distress warrant. Complainant believes that Carlton T. fully expected to pay all these debts by his crops, but by reason of bad seasons, etc., they are totally inadequate for that purpose.

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He applied in payment of the rents a considerable portion of the crop, and sold off a considerable portion of the stock, intending with the proceeds to pay off said debts. All he has with which to pay the same are the thirty or forty bales of cotton aforesaid, levied on by Griffin & Clay, five head of mules and horses, about thirty head of stock, hogs, etc., and a lot of plantation implements and tools. Carlton T. is insolvent, and as Griffin & Clay, Williams & Company and Jones are proceeding to collect said debts out of his remaining property, the said trust funds in his hands will be lost to complainant. The \$6,700 00 claimed as trust funds is invested in the very stock, mules, horses, etc., covered by Griffin & Clay's and Williams & Company's mortgages. Her debt is of the highest nature against all of Carlton T.'s property. The unpleasant position of Carlton T. prevents him from protecting her trust property, he having given these liens, and unless he is restrained from settling said debts, and said creditors restrained from proceeding against said property, and unless said property or its proceeds is brought into court, she is remediless.

Prays that Griffin & Clay, Williams & Company, Jones and Carlton T., be considered parties; that said creditors be enjoined from enforcing their claims at law; that Carlton T., be restrained from paying said debts, and be decreed to account to her for \$6,700 00 cash, and be required to invest the same with the interest thereon.

Carlton T. Belt and Griffin & Clay answered the bill, but the facts set up are unnecessary to an understanding of the decision.

The chancellor granted the injunction and appointed Herman H. Perry receiver, to take charge of the property in controversy, to sell the same, and to hold the proceeds thereof subject to the order of the court.

Upon the final trial the jury found for the complainant, as her trust property, \$5,252 50, for F. A. Jones, executor, for rent of McGruder place in 1871, \$400 00; for Griffin and Clay, the remainder of \$1,562 44.

At this stage of the case, *i. e.*, after verdict, James A.

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Gray appeared with his said judgment against Carlton T., and took a rule *nisi* against the receiver, setting out the fact that he had in his hands about \$7,000 00; alleging that all or a greater part thereof belonged to Carlton T.; that his was the oldest judgment, and requiring the receiver to show cause why he should not satisfy the same out of the funds in his hands.

The receiver answered, stating that he had on hand, after deducting the amounts at divers times paid out to said Ella J., under orders of court, the sum of—in cash, \$1,486 57 in other assets, \$4,605 29—making a total of \$6,091 85.

Upon the reading of this answer counsel for Ella J. Belt moved that she, Griffin & Clay, F. A. Jones, executor, and Carlton T., the parties to the said bill, be made parties to said rule, to resist the same, and in said motion to make parties, alleged that by said verdict in said cause all the funds in the receiver's hands had been appropriated to the said Ella J., F. A. Jones and Griffin & Clay.

Said motion was granted.

Counsel for Ella J. Belt offered in evidence all the record in said cause in equity. Counsel for Gray objected to its admission on the grounds:

1st. That as Gray was no party to said cause or proceeding he was not bound thereby.

2d. That no decree had been rendered on said verdict.

All of these objections were overruled, the record admitted in evidence, and Gray excepted.

It was admitted on the hearing that the sheriff had levied Gray's execution on the cotton aforesaid and was proceeding as usual in such cases; that he was stopped by the attorney for Ella J., and by the receiver, they telling him that he was prevented by the injunction granted in the equity case from making the money thereon. It was also admitted that Gray's judgment was the oldest and that no decree had been entered on said verdict in the equity cause. The court dismissed the rule against the receiver on the ground that the said record showed that the funds in the receiver's hands were covered by

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a trust and by liens superior in dignity to Gray's judgment. To which ruling Gray excepted. Error is assigned upon each of the aforesaid grounds of exception.

JAMES S. HOOK, by SAMUEL F. WEBB, for plaintiff in error.

CARSWELL & DENNY, by brief, for defendant.

McCAY, Judge.

This case was argued on the assumption that the judge had held the decree conclusive as to Mr. Gray. We have looked closely into the record upon this point and we do not find any such ruling. All that the judge held was that it was proper to go to the jury as evidence; the weight and effect of it he did not pronounce upon. We recognize the right of Mr. Gray to come in. Though not strictly a creditor's bill, the proceeding was in the nature of such a bill. The fund was in the custody of the court and the legal process of the movant could not get at it. The proper course would have been to have made Mr. Gray a party to the bill on his motion. In a rule against the receiver it would seem that the previous judgment should be at least *prima facie* good. Even if Mr. Gray was a formal party he could hardly ask that the court should call upon the other parties to again go over their case. So far as Mr. Gray could show the judgment wrong we think he had a right so to do. He has not, in our judgment, done this. Mrs. Belt had a right to follow the proceeds of her money into the property in which her husband invested it. He was her trustee; the rent was a legal charge and so was the claim of the factors. Without some proof on the part of Mr. Gray that the judgment was wrong we think it ought to stand. He seems to have been notified of the filing of the bill, and ought then to have come in; he might then have put the parties on their proof.

Judgment affirmed.

Burnside *vs.* Terry *et al.*

JAMES W. BURNSIDE, plaintiff in error, *vs.* BIRD TERRY & *al.*, defendants in error.

1. B held judgments against F. for \$8,000 00, obtained before 1868. In 1869, F. had a homestead assigned in certain lots of land. It does not appear that there were any minor children. Before the homestead was finally approved by the ordinary, F. signed a deed, regularly attested, conveying one of the lots of land contained in the homestead to B. The wife of F. also signed the deed, but her signature was attested only by one witness. The deed recited the fact that B. held the judgments for \$8,000 00; that the homestead had been taken by F.; that B. had made no objections on an agreement that the lot should be conveyed to him in full satisfaction of the judgments, provided they were not paid:

Held, that as no title was vested in the beneficiaries of the homestead as against the judgments held by B., and as no fraud is charged in the transaction, the title conveyed by F. to B. is good against the claimant under the homestead.

2. Where clients authorize their attorney at law to make a certain contract with a party, which is done, and the contract is carried out according to the agreement, such authority thus given is not a confidential communication by the clients, and the attorney is a competent witness to prove the contract.

Deed. Homestead. Evidence. Attorney and client. Confidential communications. Before Judge BUCHANAN. Hall Superior Court. June Adjourned Term, 1873.

James W. Burnside brought complaint against Bird Terry, Bowling W. Field and his wife, Levada Field, for lot of land number forty in the tenth district of the county of Hall. The defendants pleaded the general issue, and also that the title to said land was in Field and his wife.

Plaintiff relied on a deed made by Field and his wife, two of the defendants, (the other defendant, Terry, being merely a tenant,) said deed dated April 30, 1869, and an order from Field to Terry, the defendant, dated December 19, 1870, to deliver possession of the land to plaintiff.

Defendants relied on a judgment of the court of ordinary of Lumpkin county, setting apart the land as a homestead. The homestead lies part in Lumpkin and part in Hall coun-

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ties. There were objections filed as to the appraisement and survey of each, and separate appraisers appointed for each county. On the 24th of April, 1869, the return of the appraisers from both counties being in, the ordinary-passed an order directing some three or four lots to be stricken from the plat, so as to bring the valuation within the amount allowed by law, directing the county surveyor to make a resurvey and a new plat accordingly, and that the homestead, as thus altered, be approved. A plat and survey were made in accordance with this order, and were sworn to by the surveyor on the 26th of April, 1869. There is confusion in the record as to the date when this corrected plat was filed and approved. A memorandum, not signed by any one, states that it was approved April 24th. This seems a mistake, as the surveyor did not swear to it until two days afterwards. It was not recorded by the clerk of the superior court until May 12, 1869. The same surveyor, B. F. Sitton, is a witness to the deed under which plaintiff claims, and he swears that the defendants signed the deed at the time he went to lay off the homestead, (after telling him all about the compromise, as expressed in the deed,) and that this was before the homestead was granted. The consideration expressed in the deed was, that the grantee, Burnside, held judgments which were a lien on all the property of Field and wife, to the amount of \$3,000 00; that Burnside made no objections to the homestead, which comprised divers other lots, this one (number forty,) being one of them, upon the following contract and agreement: "That if the said Bowling W. Field does not pay, or cause to be paid fully off said sum of money due on said *fi. fas.* on or before the 1st day of January, 1871, then the lot or fraction of land number forty in the tenth district of Hall county, Georgia, known as the Field's fraction, on the Chastatee river, valued at the sum of \$1,000 00, is the right and property of the said James W. Burnside, his heirs and assigns forever, in fee simple; and said judgments and *fi. fas.* are to be held and considered in law and equity fully paid off and satisfied as to said Field, his heirs and representatives." The other prop-

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erty in the homestead of realty, when taken with the aforesaid lot, was sufficient to run it up to the full value of \$2,000, and the personality nearly up to the \$1,000 00, from all of which the lien of the judgments was to be discharged, under the contract expressed in the deed. The application for homestead did not state that Field was the head of a family, and there were, in fact, no minor children of the applicants, or either of them.

This conveyance of the homestead property was approved by A. Burnside, the ordinary of Lumpkin county and brother of the plaintiff. He was also the officer before whom the petition for homestead had been filed, who had heard all the questions made in it, and at the instance of Field and his wife had approved the survey as finally altered.

On the trial there was conflict in the testimony as to whether Mrs. Field voluntarily signed the deed; but plaintiff offered the written depositions of John A. Wimpy, the attorney for Field and his wife in filing the petition and procuring the homestead set apart in Lumpkin county, to prove, amongst other things, that before the homestead was approved he, as their attorney, and with their assent and authority, made the agreement to settle with Burnside as set out in the deed. This testimony of Wimpy was, on motion of defendants, ruled out as confidential between client and attorney. The record of the homestead from Lumpkin did not show affirmatively that Field was the head of a family, or guardian, or trustee of a family of minor children, and plaintiff objected to its admissibility on this ground. The objection was overruled. The plaintiff made in writing various requests to charge, the substance of which was that the \$3,000 00 and upwards of judgment liens being antecedent to 1868, if the parties *bona fide* settled and compromised those liens by the contract they had made, it was valid and binding, and the action of the ordinary immaterial.

There was no dispute as to the identity of the land, and the whole case turned on the validity of the deed the defendants had made to the plaintiff. The court charged the

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jury, in substance, that the plaintiff could not recover unless the deed or paper in question had been voluntarily made or signed by both Field and his wife, and that it must have the approval of the ordinary, and that an approval by an ordinary who was brother of the grantee was void unless the grantors had voluntarily waived the relationship. The jury found for defendants. There was a motion for a new trial, alleging error in ruling out the testimony of Wimpy, in admitting the record of the homestead, in charging as above stated, and in refusing to charge as requested. The motion was overruled and plaintiff excepted.

This case was before this court at a previous term : See 45 *Georgia Reports*, 621.

WIER BOYD; HILLYER & BROTHER, for plaintiff in error, cited Code, secs. 3854, 3855, 3798 ; 45 Ga. R., 621 ; 43 *Ibid.*, 318 ; 41 *Ibid.*, 622 ; Code, secs. 2002, 2025, 2032, 3589, 3594 ; 40 Ga. R., 173 ; 35 *Ibid.*, 173 ; 12 *Ibid.*, 52 ; 30 *Ibid.*, 630.

JASPER N. DORSEY, for defendants, cited Code, secs. 2690, 2706, 2025, 1783 ; 45 Ga. R., 621.

TRIPPE, Judge.

1. Burnside had obtained judgments to the amount of \$3,000 00 against Field, before 1868. Field, on his own application, in 1869, had a homestead set apart for himself as the head of a family, consisting of himself and wife. The application is in his own name, and the proceedings in the homestead case show nothing about a family, or that Field was the head of a family. The evidence in the ejectment case proves that he had a wife. A few days after the homestead was assigned, Field executed a deed to Burnside to a part of the land contained in the homestead, worth \$1,000 00, in satisfaction of Burnside's judgments. This was done under a previous agreement between the parties. Mrs. Field joined her husband in the deed, but there was only one witness who attested her signature, and the ordinary who approved the

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deed was the brother of the grantee. Burnside claimed title under this deed. This case was before this court at July term, 1872: See 45 *Georgia*, 621. It was there held that the deed to Burnside was a deed conveying the land on a condition subsequent, and not a mortgage. The deed is set out in full in the report of that case. This point is no longer open. It was also then held that the ordinary who approved the deed of the husband and wife, being the brother of the grantee, the deed was invalid. It was also said that if the sale was for the extinguishment of the husband's debts, it was not a legal sale. But all this was on the assumption, as was then held to be the law, that the homestead was not liable to the judgments of Burnside against the husband, and WARNER, chief justice, who pronounced the opinion of the court, says: "If the homestead is to be held good as against the pre-existing debts of the husband, the ordinary should not have approved the sale of the land for that purpose." Since that time it has been finally settled that the homestead is not good against such debts, and that the homestead act, to that extent, is unconstitutional and void. This being so, the *voluntary conveyance* by the husband, through the medium of the ordinary, and in the form of a homestead of this land, for the benefit of himself and wife, or as the homestead proceedings show, to himself, as a homestead, was void. Section 1952, Code, declares that every voluntary deed or conveyance not for a valuable consideration, made by a debtor insolvent at the time of such conveyance, shall be *fraudulent in law* against creditors, *and as to them null and void*. Section 2662 says, an insolvent person cannot make a valid gift to the injury of his existing creditors. Section 2631 enacts that every sale made with intent to defraud either creditors of the vendor or prior or subsequent purchasers, if such intention be known to the vendee, should be absolutely void as against such creditors or purchasers. If these deeds or conveyances thus declared void, absolutely null and void as against creditors, are so when made by the debtor directly, they are equally so if he join with him in their execution a trustee (section 1952,)

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or if he procure the ordinary to make a record of it in the form of an application for a homestead. There was then no title vested in Fields and his wife, the beneficiaries under the homestead, as against Burnside, the judgment creditor, and as no fraud is charged in the transaction against the creditor, the title conveyed by Field is good against him or his wife as claimants of the homestead.

2. Had the testimony of John A. Wimpy, Esq., been admitted it would have shown that Field and wife, before the homestead was set apart, had agreed with Burnside that this lot should be conveyed to him, that they had in advance contracted with the creditor that if no objections were filed to the application for the homestead he should have the lot and a deed would be made to him and that this was done through their attorney, the said Wimpy, and by their authority. If the fact of Mr. Wimpy's having this authority was communicated by him to Burnside, and Burnside, through him, made the contract and acted on it, and it was accordingly carried out, it could not be that the giving such authority was such a communication by client to attorney that it is protected by law against being proven by the attorney. If a party hold out his attorney as one having authority from him to make a special contract respecting pending litigation and the attorney acts upon it, treats with his antagonist and thereby secures important rights to the client, he cannot deny the right of the attorney or of the opposite party to prove by the attorney the contract and the authority to make it. It is as if the attorney was constituted a special agent for that purpose. We would not trench upon the sacredness of confidential communications of client to attorney, but that is not intended to be confidential or sacredly secret which the attorney is to propose to the other party as a foundation for bargains and contracts for the benefit of the client when these proposals are accepted and acted on and the benefits secured. If this be the state of the case as to Mr. Wimpy's testimony, it should have been admitted.

Judgment reversed.

Moreland *et al.* vs. The State of Georgia.

EDMOND MORELAND *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

Where, at the second term, after a demand for trial in a criminal case, the case was called in its order and the defendants failed to appear, and the recognizance was forfeited, and no new application was made to the court for trial, and no excuse given for failure to appear at the calling of the cause, it is too late after the juries are discharged, to ask for an order discharging the defendants, nor does it help the case that the judge had announced, after he had gone through the criminal docket, that he would not try any more criminal cases, and that the defendants' counsel had informed the solicitor general that they desired their case tried. The application should have been to the court, with an excuse for failing to appear at the calling of the cause.

Criminal law. Demand for trial. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

At the May term, 1872, of Troup superior court, an indictment was found against Edmond Moreland and Samuel Watts, for the offense of larceny from the house. At the November term of the same year, a demand for trial in behalf of both of the defendants, was entered on the minutes. At the May term, 1873, the case was called in its regular order and the defendants not appearing, their bonds were forfeited. After the call of the criminal docket was concluded the court announced that no other criminal cases would be called except those in which bills had been found during that term. During the call of cases embraced in the above exception, defendants stated to the solicitor general that they would like to be tried. Subsequently, on the last day of the term, after the juries had been dismissed, defendants moved for an order of discharge. The motion was overruled and defendants excepted.

B. H. BIGHAM, for plaintiffs in error.

A. H. Cox, solicitor general, for the state.

McCAY, Judge.

As a matter of course this section of the Code authorizing the defendant in a misdemeanor to demand a trial, and if

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not tried at the second term after such demand is put on the minutes, to demand his discharge, must be qualified so as not to give him his discharge when the failure to try is his own fault, and so this court has in effect ruled: 21 *Georgia*, 148. Whose fault was the failure here? When the criminal docket was called, the case against him was called and he did not appear. *Prima facie*, we think this put him in fault, and he had no *legal right* to insist on his demand after this. To give a defendant the right thus to play fast and loose with the court, to be absent at his pleasure when his case is called in its order, and then speculate upon the occupation of the court until he sees it practically impossible to try him, and then and there insist upon his demand, would be to make a statute intended to prevent oppression a machine for defrauding the law. As we have said, we think when he failed to be present at the regular call of the court he lost his absolute right to be tried. If after this he can present a good excuse for his absence, and the court has not, in the progress of business, got something else on hand that would make indulgence to a prisoner a public wrong, we think it would be the duty of the court to try him at his request, or at the pleasure of the court. But if he wait, as he did here, until the juries are discharged, we think common sense as well as any fair construction of this act, declares that he is too late. Juries are not then empanneled and qualified to try him. This statute was not passed to enable criminals to escape, but to prevent innocent persons from being harassed by improper delay. We cannot but suspect that the defendant's anxiety for a trial did not fully develope itself until he saw a trial was impossible, and his is not the first instance of men being very anxious for a fight as soon as it is apparent that no fighting can possibly be done. There is nothing in the conversation with the solicitor general. He does not and ought not to control the business of the court.

Judgnient affirmed.

Wright *vs.* Rutledge.

F. B. WRIGHT, plaintiff in error, *vs.* J. N. RUTLEDGE, defendant in error.

Where suit is instituted in a justice court for \$55 00 damages, and the claim as to \$5 00 is abandoned, the right of carrying the case by writ of *certiorari* to the superior court for review exists.

Certiorari. Damages. Before Judge HALL. Newton Superior Court. September Adjourned Term, 1873.

For the facts of this case; see the decision.

EMMETT WOMACK, for plaintiff in error.

SIMS & SIMS, by brief, for defendant.

WARNER, Chief Justice.

The error complained of in this case is that the court below dismissed the plaintiff's *certiorari* on the ground that the amount in controversy between the parties in the justice's court exceeded the sum of \$50 00, and that the plaintiff's remedy was by an appeal to the superior court and not by *certiorari*. Without expressing any opinion as to whether the remedy by *certiorari*, as provided for by the 4049th and 4052d sections of the Code, is taken away in any case where the amount in controversy exceeds \$50 00, by the proviso to the 2d section of the act of 1868, we are of the opinion that this case comes within the principle decided by this court in *Clements vs. Painter*, 46 Georgia Reports, 486. The plaintiff, in the justice's court claimed damages to the amount of \$55 00, \$50 00 for injury done to a cow, and \$5 00 for injury done to a hog. At the trial the plaintiff abandoned his claim for damages to the hog, and insisted on damages for the injury done to the cow only, and that was the only question considered and determined in the justice's court, as appears from the justice's return. The plaintiff having abandoned his claim for damages to the hog, the only amount which he claimed before the justice's court was \$50 00 for the injury done to

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the cow, so that the defendant was entitled to his *certiorari* in that view of the case, and the court below erred in dismissing it.

Let the judgment of the Court below be reversed.

JOHN BONNER, plaintiff in error, vs. JAMES B. MARTIN, administrator, defendant in error.

1. A judgment cannot be opened and reduced according to the equities between the parties under the act of 1868, if when it was obtained, the defendant pleaded the ordinance of 1865, and a verdict of a jury then fixed the amount due, according to the principles of equity.
2. Where a motion was made to open a judgment, under the act of 1868, which was demurred to on the ground that the act was unconstitutional, and the demurrer was overruled:

Held, that it was not error in the judge, when the case was called for trial, to dismiss the proceedings on the ground that upon an inspection of the declaration and pleas it appeared that the equities between the parties had been fully inquired into and settled on the trial at which the judgment was rendered.

Relief Act of 1868. Scaling ordinance. Judgments. Practice in the Superior Court. Before ALBERT H. COX, Esq., Judge *pro hac vice*. Carroll Superior Court. October Term, 1873.

This is the second time this case has been before this Court: See 40 *Georgia Reports*, 501.

The facts were as follows: Martin, as administrator, brought complaint against Bonner to the October term, 1866, of Carroll superior court, on a note dated December 27th, 1862, for \$1,163 32. The defendant pleaded Confederate money consideration, a tender of full amount in that currency during the war, and of an amount in United States currency since the war equal in value to the sum borrowed according to the table used for scaling. At the April term, 1867, the defendant confessed judgment for \$500 00, "conceding to plaintiff the right of appeal." The plaintiff appealed, and upon a

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trial at the October term, 1867, the jury found for him the same amount as had been confessed. At the April term, 1869, a motion was made by the defendant to open the judgment rendered on the aforesaid verdict, under the provisions of the relief act of 1868, setting up substantially the same defenses as were embraced in his pleas. On demurrer, the motion was dismissed, the court holding said act unconstitutional. This decision was reversed by this court. The motion was again pressed at the October term, 1873. Plaintiff moved to dismiss it because all of the material issues had been passed on in the trial had at the October term, 1867. The motion was dismissed, and defendant excepted.

AUSTIN & HARRIS; JOHN S. BIGBY, by W. F. WRIGHT, for plaintiff in error.

W. W. & G. W. MEBRELL; J. B. S. DAVIS; C. W. MABRY, for defendant.

McCAY, Judge.

1. We do not think the judgment of this court, when this case was before it on a demurrer to the affidavit, controls it in its present shape. The question now made is, that admitting the facts stated to make a good case, there is another fact not set out in the affidavit, which made it the duty of the court to dismiss it, to-wit: that the very equities now set up were set up and passed upon in the original suit. In *White vs. Herndon*, 40 Georgia, 500, this court distinctly say, that while an equitable right is not barred by a judgment at law, nor an offset extinguished, yet that this is only true when the equity or offset has not been set up at law. Under our law you *may* set up any defense at law that, by the principles of equity, would justify relief in equity. It would seem to follow, therefore, that if an offset or an equity be set up at law and the finding is against the plea, the judgment is conclusive.

2. When this case was called in the court below it was in order for the plaintiff to prove any fact which met or avoided

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its statements. He introduced the record of the original suit. A record is an estoppel upon the parties to it, and is to be tried by inspection. Upon this inspection it appeared as a fact that the very equities now set up were set up and passed upon in the original trial. This was conclusive. There was nothing for a jury to pass upon; it was a mere question of the construction of a record.

Judgment affirmed.

JOSEPH A. L. LEE *et al.*, plaintiffs in error, vs. THOMAS A. BODDIE, administrator, defendant in error.

The decision of the court below in dismissing the motion for a new trial, and in holding that there was not sufficient evidence that it had been filed at the proper time, was not in such conflict with the evidence offered at the hearing as to call for a reversal by this court, the more especially as five years had elapsed since the trial, with several changes in the presiding officers of the court, and there had not been, in the meantime, nor at the term at which it is claimed the motion was made, any verification of the grounds therein taken, nor any motion during that time to have the proper entries made on the papers or on the minutes of the court.

New trial. Practice in the Superior Court. Before Judge BUCHANAN. Troup Superior Court. November Term, 1872.

This case was tried at the November term, 1867, of Troup superior court, and resulted in a verdict for defendant. At the November term, 1872, what purported to be a motion for a new trial was called. Counsel for defendant moved to dismiss the same upon the ground that it did not sufficiently appear that said motion was made during the term at which said trial was had. Upon this point the evidence was substantially as follows:

The paper containing the motion for a new trial was produced, accompanied by the brief of evidence agreed upon by counsel. On the back of the motion was an acknowledgment

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of service, with neither date nor signature. The entries on the motion docket showed rule *nisi* granted at November term, 1867. Also, a continuance at that term, again at November term, 1868, again at May adjourned term, 1869. The entries made at the November term, 1867, were in the handwriting of Judge Collier, the then presiding officer of the Court. The motion was marked, "filed in office, December 26th, 1867," signed by the clerk. In reference to this entry, the clerk testified that the paper was in office during the November term, 1867, of the court; that after the adjournment, he called Mr. Bigham's (counsel for complainants,) attention to it, who stated that it should have been marked filed in office during the term, but that, under the practice there, it would make no difference; that he then made the entry which appears.

Mr. Bigham testified that the motion was prepared and entered, and that it was agreed that service was acknowledged by opposite counsel at the term during which the trial was had.

Mr. Toole, of the firm of Mabry & Toole, of counsel for defendant, in whose handwriting the agreement upon the brief of testimony appeared to be, testified that he had no recollection of acknowledging service on the rule *nisi*. Mr. Mabry, the other member of said firm, testified to the same effect.

In the interval between the trial term and that at which the motion for a new trial was pressed, several different judges had occupied the bench.

The court dismissed the motion, and complainants excepted.

B. H. BIGHAM, for plaintiffs in error.

MABRY, TOOLE & SON; B. H. HILL & SON, for defendant.

TRIPPE, Judge.

It was claimed by plaintiff in error that the motion was made for a new trial within the proper time, and that it was error in the court to dismiss it. Five years had elapsed since the trial; there had been several changes in the presiding offi-

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cers of the court; there had been no verification of the grounds recited in the motion, neither at the term the motion is claimed to have been made, nor at any subsequent term, down to the time of the motion to dismiss. There was no rule *nisi* signed by the court or entered on the minutes, nor was there any acknowledgment, signed by counsel, of notice of the motion, or of the rule *nisi*, which it is also claimed was granted by the court. Section 3723 of the Code provides that in all applications for a new trial, the opposite party shall be served with a copy of the rule *nisi*, unless such copy is waived.

The papers in this case were in too imperfect a condition, and the rules regulating motions for new trials too much disregarded, to allow the motion and service to be perfected after such a length of time. It would beget a practice which would produce confusion, and burden the courts with having to decide matters five years after they transpired, and this, too, from the conflicting recollections of the parties; whereas, if the law had been observed, all would have been in writing, and no dispute as to its correctness.

We cannot say that, under the circumstances, the court erred in dismissing the motion.

Judgment affirmed.

ISAAC A. HAISTEN, plaintiff in error, *vs.* SAVANNAH, GRIFIN AND NORTH ALABAMA RAILROAD COMPANY, defendant in error.

Where a bill was filed for the specific performance of a contract, not in writing, alleging that the officers of a certain railroad company, in consideration that the plaintiff would consent that the road should run through his land, without charge against the company for the right of way or for damages, if the company would erect a depot on plaintiff's land and make it one of its stations, and setting forth that the road had been built, and that plaintiff had not claimed or recovered anything for the right of way or for his damages:

Held, that there was no such part performance of the contract by either party as authorized a specific performance of this agreement, not in writing, in relation to lands or an interest therein.



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Specific performance. Statute of frauds. Before Judge BUCHANAN. Fayette Superior Court. October Term, 1873.

Haisten made by his bill, in brief, this case: In the year 1859, he owned lands in the county of Fayette, which were of great value for cultivation. The Savannah, Griffin and North Alabama Railroad Company was desirous of securing the right of way for its road through said property. On account of the amount of land which would be thus appropriated, and of the long lines of fencing which he would be compelled to build, he refused to convey to the defendant the right of way for any money consideration. Miles G. Dobbins, the president of said company, in his official capacity, then proposed that if the complainant would comply with his request that the defendant would build a depot on said land for his use and that of the neighborhood. Complainant, thus induced, consented to allow the defendant the right of way, in consideration that it would build the aforesaid depot and the necessary stock-gaps. Under this agreement the defendant constructed its road, appropriating land, cutting down timber and rendering the construction of fences necessary, to the damage of complainant \$2,500 00. All of this he would have been willing to have lost, had he derived the benefits of a depot. Had the contract of the defendant been complied with, the value of his lands would have been greatly enhanced, and he would have been saved an immense amount of inconvenience. The damages thus sustained and still being incurred are inestimable and irreparable at law. His only remedy is by compelling a specific performance of the contract on the part of the defendant. Prays that the defendant may be compelled to perform its contract by the erection of the depot, etc. The bill alleges no written agreement upon the subject of said right of way and erection of a depot. On demurrer the bill was dismissed, and complainant excepted.

D. N. MARTIN; R. T. DORSEY, for plaintiff in error.

SPEER & STEWART, by R. H. CLARK, for defendant.

McCAY, Judge.

If the contract set up by the complainant were in writing we are not prepared to say that equity would not decree a specific performance of it. The damages are so difficult to estimate with any approach to certainty that true equity would require a specific performance. The case in 32 *Georgia*, 550, stood on peculiar facts, since the defendant would only be called on to act when the plaintiff had freight ready, and there might be difficulty in enforcing the decree for that reason. But every decree for specific performance of an undertaking to do a continuous act, is subject to the objection, that the matter is never final. Nevertheless the judgment is final, and attachment for contempt in failing or refusing to obey it is always in the power of the court. But this contract is not in writing; it concerns an interest in land. The right of way on one side and an easement on that right of way on the other, and by the statute of frauds it can only be proven by a writing signed by the party to be charged. It is contended, in reply, that the contract has been performed on the part of the complainant, and that equity, to prevent the statute from being used as an instrument of fraud, will decree a specific performance of it, though it be only in parol.

The real question therefore, is, has there been a part or entire performance by the complainant. He alleges that he put the defendants into possession, or rather, that they went into possession, with this understanding and in pursuance of this contract. But the fact is that they were authorized by their charter to take possession. They had a right already in existence at the date of the contract, to take the right of way as they took it, on payment of just compensation. The complainant had no right to fix the route the road would take in passing through his land. They might run through one part of it or another, along the line or through the middle. That was a matter exclusively for the determination of the railroad company, and the consequence of one route or another was to increase or lessen the damages. At last the contract set up is

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simply a substitute for, or a mode of, fixing the compensation. They would have gone into the possession of the right of way whether this contract was made or not. They did not take possession by virtue of and by reason of this contract.

A court of equity interferes to decree the specific performance of a parol contract void by the statute of frauds, only and solely because the parties have so far acted upon and by virtue of the contract as that it would be a fraud to permit the defendant to repudiate it. If the *contract* be so far executed by the party seeking relief and at the instance or by the inducements of the other party, that if the contract be abandoned the party acting cannot be restored to his former position, equity will interfere. Full payment alone, accepted by the vendor, or partial payment, accompanied with possession, or possession alone, with valuable improvements, if clearly proven in each case to be done *with reference to the parol contract*, will be a sufficient part performance to justify the decree: Code, 3187. These apt words of our Code contain the doctrine in a nut shell. The party seeking relief must have acted in some material matter by virtue of and by reason of the contract, must have put himself in a new position, so that he cannot be returned to his former position.

What has the plaintiff done here? He has simply stood by and permitted the railroad company to appropriate his land without moving to have his damages assessed. He has done no act, put himself in no new position. The company has simply done what it had a right to do, and the plaintiff stands just where he would have stood had the parol contract, as to the mode of compensation, never been made. He can now proceed to have his damages assessed as he could have done then. He has given up nothing. He is now attempting to charge the right of way with a burden the charter does not cast upon it, and that burden is an interest in the land, a duty to put up on the right of way a depot, and use a particular part of the right of way as a place for receiving and delivering freight and passengers. For these reasons we think the demurrer was properly sustained. Judgment affirmed.

MILES G. DOBBINS, plaintiff in error, *vs.* CHARLES J. JENKINS, defendant in error.

1. Where, at the second term after the declaration was filed, the court passed an order allowing the plaintiff further time to perfect service on the defendant, who was a citizen of the county in which the suit was pending, but had been temporarily absent from the United States, and service was made in accordance with said order, it was error, two years thereafter, when the case was called for trial, to dismiss it for want of service.
2. When the attention of the court was called to the case at the second term thereof after the institution of the suit, it would have been its duty to have dismissed it for want of service, unless it had been made to appear that diligence had been exercised by the plaintiff.

Service. Diligence. Practice in the Superior Court. Before Judge GIBSON. Richmond Superior Court. April Term, 1873.

For the facts of this case, see the decision.

AMOS T. AKERMAN, for plaintiff in error.

BARNES & CUMMING; W. H. HULL, for defendant.

WARNER, Chief Justice.

It appears from the record in this case that the plaintiff instituted his suit against the defendant in Richmond superior court on a demand originating prior to 1st of June, 1865. The petition was filed and the process attached and dated 31st December, 1869. The sheriff made his return thereon, dated 28th of May, 1870, that the defendant was not to be found. No action appears to have been taken in the case at the appearance term. At the next term, on the 18th of January, 1871, on the motion of plaintiff, *ex parte*, the court made the following order, after stating the names of the parties: "It is, on the application of plaintiff's counsel, ordered that further time be allowed to perfect service in said case." On the 3d of February, 1871, the defendant was served personally by the sheriff of Richmond county. When the case was called for trial at the April term, 1873, defendant's counsel moved to dismiss it

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for want of service, and showed the facts above stated in support of his motion. In opposition to the motion, the plaintiff showed that at the date of the filing and process, and of the sheriff's first return, the defendant, who had long been, and still was, a resident of Richmond county, was absent from the United States with his family, but intending to return to said county, and his dwelling house was occupied by another citizen. On this statement of facts, the court decided that there had been no sufficient service, and dismissed the case; whereupon the plaintiff excepted.

By the 333d section of the Code the date of the filing of the plaintiff's petition in the clerk's office was the commencement of his suit against the defendant. The annexation of the process thereto by the clerk, and service thereof on the defendant, is the means provided by law for bringing the defendant into court to answer that suit. The defendant, though a resident of Richmond county, being temporarily absent therefrom, was not served with process until after the second term of the court, but the suit had not been dismissed out of court for want of service. At the second term, the suit still being in court, the court, on the application of the plaintiff, by its order of the 18th of January, 1871, allowed him further time to perfect service on the defendant, who was personally served with process on the 3d of February, 1871. At the trial term of the case, more than two years after the defendant had been served, the motion to dismiss the case was sustained because there had been no sufficient service on the defendant. When the attention of the court was called to the case at the second term of the court, it would have been its duty to have dismissed it for want of service, unless it had been made to appear to the court that there had been no want of diligence on the part of the plaintiff in having the service perfected on the defendant.

As the court did not then dismiss the case, but granted the order allowing the plaintiff further time to perfect service on the defendant, the legal presumption is that good and sufficient reasons were shown to the court for its action. It is

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true that the order allowing the plaintiff further time to perfect service on the defendant, to bring him into court, was an *ex parte* order, yet it is also true that when the defendant was served, he had the right then to have come into court and to have had that order set aside, if there was any good and legal ground for doing so. But it will not do to say and establish the precedent that the court can grant an order allowing the plaintiff further time to perfect service, and service is perfected on the defendant in pursuance of that order, and the defendant lies by for more than two years after he has been served without taking any steps to have the order set aside, if there were any legal grounds to authorize him to do so, and the plaintiff, in the meantime, be put to the trouble and expense of preparing his case for trial, and at the time of the trial of the case, move to dismiss it, on the ground that he has not been served. In dismissing the case at the trial for want of service, the court *ignored* its order allowing further time to the plaintiff to perfect service, and the proceedings taken under it, which order stands unrevoked on the records of the court.

No technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this Code, and the defendant has *notice* of the pendency of the cause, all other objections shall be disregarded; provided, there is a legal cause of action set forth, as required by this Code: Code, section 3345.

In our judgment, the court erred in dismissing the plaintiff's case, on the statement of facts contained in the record.

Let the judgment of the court below be reversed.

ATLANTA NATIONAL BANK, plaintiff in error, *vs.* ROBERT O. DOUGLASS, defendant in error.

1. A, for B's accommodation, indorsed B's note to C. It was agreed between all the parties at the time of the indorsement that B should give to C a mortgage upon his (B's) stock of goods, as a security for

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the debt, and this was done as agreed. But C failed to record the mortgage, and at the end of three months canceled it and took another:

Held, that this discharged the security.

2. The security is discharged, notwithstanding it may be affirmatively shown that the mortgage, though duly recorded and not canceled, would have been no protection to the security by reason of older liens.

Indorsement. Principal and security. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

The Atlanta National Bank commenced twelve suits against Isaac Wise, as maker, and Robert O. Douglass, as indorser, on twelve notes, each for \$100 00, in the justice's court for the six hundred and fifty-fifth district. Judgments were rendered for the plaintiff, and Douglass appealed to the superior court, where the cases were consolidated. The defendant pleaded the general issue and release. The testimony presented the following facts :

Wise was indebted to the plaintiff in the sum of \$1,310 00 on a draft. This amount was divided into three notes, upon which the defendant became indorser. These notes were sued, and in settlement of this case the twelve notes above referred to were given. Defendant would not have consented to this settlement had he not been assured by counsel for the plaintiff that he would be fully protected, as indorser, by a mortgage on Wise's stock of goods, which plaintiff was to take. With this understanding he indorsed the notes. The mortgage was executed by Wise and delivered to the plaintiff. It was not recorded within three months from the date of its execution. It was then canceled, and a second mortgage given on the same property. Had the first been recorded within the time prescribed by law it would have afforded no protection to the defendant, on account of older liens. Judgments had been recovered against Wise intermediate the dates of the two mortgages.

The court charged the jury, "that if the plaintiff took a mortgage on Wise's stock of goods, as collateral security for the debt on which Douglass was security, and failed to record

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the same within three months from the date of the mortgage, so that the lien became postponed, or that the plaintiff surrendered and delivered up to Wise, the maker, the mortgage, so that the lien became lost or destroyed, and you further believe from the evidence that Douglass, as accommodation indorser, was thereby injured, or that his risk was increased, or that he was exposed to greater liability, then Douglass is discharged. If you believe from the evidence that the surety's risk was not increased, nor the surety exposed to greater liability, nor injured thereby, then he is not discharged. In this connection I call your attention to the principle of law, that if judgment liens were obtained, or might have been obtained, in the interval between the making of the mortgage and the end of the three months, against Wise, or that in that time the maker, Wise, might have sold the mortgaged property to an innocent purchaser without notice of the mortgage, this would increase the surety's risk and expose him to greater liability."

To the last sentence of which charge the plaintiff excepted because it excluded from the jury all consideration of the question as to whether in fact the defendant was injured.

The plaintiff requested the court to charge, "that if it should appear in the proof that valid and subsisting liens, older than the first mortgage taken by the plaintiff, existed against the stock of goods covered by plaintiff's mortgage, and exceeded in amount the value of the stock so mortgaged to plaintiff, then, upon these facts appearing, the risk of the surety was not increased by this failure to record. How the truth is the jury must determine. The court expresses no opinion upon the facts."

The court refused thus to charge, and plaintiff excepted. The jury returned a verdict for the defendant. A motion for a new trial was made alleging error in the aforesaid charge and refusal to charge. The motion was overruled and plaintiff excepted.

SIDNEY DELL; W. O. TUGGLE, for plaintiff in error.

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SPEER & SPEER, for defendant.

McCAY, Judge.

1. There is no real dispute between the parties as to the material facts upon which arises the legal question made in the record. Both sides agree that it was part of the agreement, at the time these notes were taken, that a mortgage should be executed by Wise to the plaintiff upon his (Wise's) stock of goods. The plaintiff's witness insists that this was a mere favor by him to the security, while the security insists that it was a *sine qua non* for his action, and that he would not have agreed to the arrangement at all except for this agreement. We do not think the difference is material. The fact is undisputed that a suit was pending in favor of the bank against the defendants, the one as principal and the other as security; that it was agreed that the suit should be dismissed; that the present notes, each for \$100 00, should be given in lieu of the old debt, and that Wise, the principal, should give the mortgage. The giving of the mortgage was a part of the contract at the time the notes were taken, just as truly whether it was agreed to as a favor to Douglass, or whether Douglass made it a condition on which he agreed to the new arrangement. At least, the contract, if stated truly, was that the pending suit should be dismissed, that the notes now sued on (upon which Douglass is, in terms, only security) should be taken in lieu of the old debt and that a mortgage should be executed by Wise to the plaintiff on his stock to secure the debt. This mortgage was in fact executed and the plaintiff put in possession of it. He not only failed to record it, but gave it up to Wise without the knowledge and consent of Douglass and took another to suit himself. We think under the provisions of the Code this was a discharge of the endorser, and that under the facts of the case the charge of the judge was right. Section 2154 of the Code provides that any act of the creditor which injures the surety, exposes him to greater liability or increases his risk will discharge him."

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2. It is contended in this case that as there was evidence going to show that the surety was not in fact hurt by this act of the plaintiff, the judge should have charged the jury that the surety was not discharged if he was not injured, or at any rate, that he was only discharged *pro rata*, according to the amount of injury. But the Code very certainly means more than this; it does not stop at the words "injures the security," it adds, "increases his risk or exposes him to greater liability." It is insisted, however, that as the Code only purports to be a re-enactment of the old law, that these broad words are to be qualified by the settled rules as existing previously to the codification, and we admit that there is much good sense in this view of the meaning of this section. Ordinarily, if a creditor gets new security and loses it by his *laches* or fault, the security is only discharged *pro tanto*, and only if he be actually damaged, and this upon the common sense principle that the amount of his real hurt ought, in justice, to be the measure of his redress—no more, no less. At first sight, the case in 37 *Georgia*, 428, *Toomer vs. Dickerson*, would seem to militate against this rule, and it was so insisted at the hearing of the case at bar. But in that case, as in this, the mortgage was part of the original contract, and the fact that it was made, was one of the considerations inducing the security to act, to make the contract of securityship. It was not a case of a subsequent security as a new collateral, etc. When the additional security is part of the original contract, the surety has a right to stand on its terms. The failure of the principal to record, the loss of the lien, in this case the destruction of the mortgage, is a change in the terms of the security's undertaking. He only guarantees the notes as secured by the mortgage, and when the mortgage was destroyed his contract was no longer existent; its terms were broken. The contract that he entered into was altered. The amount of that alteration and the effect of it is immaterial. Even if his risk was lessened by it he is discharged: *Bethune vs. Dozier*, 10 *Georgia*, 235.

Judgment affirmed.

Weslow vs. Peavy & Brothers.

ADOLPH B. WESLOW, plaintiff in error, *vs.* **J. PEAVY & BROTHERS**, defendants in error.

Service of this declaration was acknowledged with a waiver of process and time of filing. This was more than twenty days before the next term of the court. The writ was filed during the second term, and judgment taken the third term:

Held, that the judgment is valid and binding as between the parties, and will not be set aside without proof that the defendant has actually been deceived thereby, or deprived of some available defense.

Service. Waiver. Filing. Judgment. Practice in the Superior Court. Before Judge SCHLEY. Chatham Superior Court. May Term, 1873.

J. Peavy & Brothers brought complaint to the May term, 1871, of Chatham superior court, against Ferrill & Weslow, on a note dated March 17th, 1870, due at sixty days, for \$1,500 00. Service was acknowledged, and copy process and time of filing waived, on February 2d, 1871. On March 25th, 1872, during the next regular term of the court, the declaration was filed in office. On September 6th, 1872, during the succeeding term, judgment was rendered by default in favor of the plaintiffs against the defendants. At the next term, a motion was made by Adolph B. Weslow, one of the defendants, to set aside the judgment, on the ground that it was obtained without due notice. The motion was overruled, and Weslow excepted.

JOHN M. GUERARD; HARTRIDGE & CHISOLM, for plaintiff in error.

RUFUS E. LESTER, for defendants.

TRIPPE, Judge.

More than twenty days before the May term, 1871, of Chatham superior court, plaintiff in error acknowledged service of the declaration and waived copy and process, and the time of filing the writ. The writ was filed during the next January

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term, which was the second term after the acknowledgment and waiver. Judgment was rendered at the next term after the filing.

Is that judgment valid? As between the parties, the case of *Steadman vs. Simmons*, 39 *Georgia*, 591, is a precedent that it is. There was a similar waiver in that case. It is true the clerk had entered on the declaration that it was filed during the first term after the waiver was made, but the defendant proposed to prove that the writ was never handed to the clerk until the judgment term, and the court trying the case refused to admit the testimony. Judgment was had for plaintiff, and affirmed by this court. As was remarked by the court in that case, we say here, that as between plaintiff and defendant, we see no reason why the time of filing may not be waived.

It was objected that there should be some limit to the right of the plaintiff in such a case to put his suit in operation by actually filing the writ; that a defendant should not indefinitely be held in suspense by such a waiver, and that there should be a time when the acknowledgment and waiver would be exhausted and inoperative. There is force in this, and perhaps the proper rule should be, that it should be filed in the office so that judgment could be rendered or a trial had at the regular judgment term after the waiver is made. In this case it was so filed, and we are inclined to think that judgment might have been taken under the waiver at the term when the writ was filed, unless the defendant could have shown that he had been misled.

If parties see proper, for purposes of their own, to waive a right which the law gives them and which they are allowed to waive, they ought not to complain at the result, unless a wrongful advantage is thereby taken by the one accepting such waiver, or they have been misled so as to lose some right of defense which otherwise would have been of value to them. Here the defendant does not claim that he has lost anything. He does not set up that he was deprived of any defense, or that he had any defense. If this had been so, the case might

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be different. He made the waiver, and if there has been any gain it is his, for judgment did not go against him until the third term after the waiver. Doubtless, the waiver was for his accommodation. He has had that, and should not complain.

Judgment affirmed.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY, plaintiff in error, *vs.* **WILLIS M. DUGGAN,** defendant in error.

On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of his co-employees, it was error in the court to permit the plaintiff to testify before the jury, that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life.

Railroads. Evidence. Principal and agent. Before Judge UNDERWOOD. Whitfield Superior Court. October Term, 1873.

Duggan brought complaint against the East Tennessee, Virginia and Georgia Railroad Company for \$15,000 00 damages, alleged to have been sustained by him on November 14th, 1871, when an employee of said defendant, through the negligence of his co-employees. The defendant pleaded the general issue.

In the course of the trial the plaintiff was permitted to testify, over the objection of the defendant, that Smith, an assistant supervisor of the defendant, told him that the company felt it their duty to support him and his family during life.

It appeared from the evidence that this conversation took place when the plaintiff had sufficiently recovered from his injuries to apply for some light job.

The jury found for the plaintiff \$1,254 00. The defendant moved for a new trial upon the ground, amongst others,

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of error in the aforesaid admission of testimony. The motion was overruled, and defendant excepted.

SHUMATE & WILLIAMSON; D. A. WALKER; R. J. McCAY, for plaintiff in error.

W. K. MOORE; JESSE GLENN, for defendant.

McCAY, Judge.

Had it been proven on the part of the railroad company, that this hitching of the dirt car to the rear of the train, to the imminent peril of every life engaged in the enterprise, was contrary to custom and contrary to orders, we should have granted a new trial on the ground that the plaintiff was injured in consequence of his own negligence. An employee is, by the express terms of the Code, section 3036, only entitled to recover for damage caused by the negligence of another employee, in the running of cars, when the injured employee is without fault himself. The doctrine of contributory negligence laid down in section 2972 and 3024 of the Code does not apply to such cases. We may say that in our judgment, this section, 3036, was not repealed by the act of 1869 repealing the act of 1856. The act of 1856 had been repealed or superseded by the act of 1860, adopting the Code, as well as by the adoption of the Code by the constitution of 1868.

As we have said, had the railroad company made the proof indicated we should have granted a new trial on the ground that the evidence conclusively showed the plaintiff to have been guilty of negligence. He should have refused to disobey the known rules of the road. He was an old hand, and if such was the rule, he will be presumed to have known it. The act was so reckless an one that we are almost ready to take it for granted that it was contrary to orders or to custom, but as it appears to have been done before, we may err in thinking it was either unusual or contrary to the rules provided for managing dirt cars. In any event, even without this, the verdict is barely supportable and we the more cheerfully grant the

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new trial, for the reason that illegal evidence was introduced over the objection of the plaintiff in error.

The statement of the supervisor that the company felt it to be its duty to support the plaintiff for life, was a statement that might very well have led the jury to think that the company was conscious the plaintiff was not in fault and that its other employees were. No authority is shown for any such statement. It was not within the natural scope of the agent's employment, nor was it if it were, a part of the *res gestae*. At best it is the mere admission of an agent not in the actual execution of his duty and was inadmissible: Code, 3787, 2206.

A railroad company, though it be a corporation wealthy and powerful, has rights before the courts which the conscience of judges is bound to respect, and we greatly fear that the reproach cast by some upon juries in their dealings with corporations has too much foundation. We are grieved to make this admission. The trial by jury is the pride of our country, and this court has always defended and lauded it. Let us take care, and let the juries take care, that in their desire to protect the weak against the strong they do not forget that unfairness and injustice are without excuse even when the victim is strong; that even the devil is entitled to his due, and that a juror who fails wilfully to give it, violates his oath.

Judgment reversed.

THOMAS R. WILLIAMS, plaintiff in error, *vs.* WILLIAM L. LAMPKIN *et al.*, defendants in error.

An exception to the judgment of a chancellor attaching the defendant in an equity cause for the violation of an injunction cannot be brought to this court under the special statute applicable to injunctions, appointment of receivers, and other extraordinary remedies in equity. (R.)

Practice in the Supreme Court. Bill of exceptions. Attachment. Contempt. Injunction. Before the Supreme Court. January Term, 1874.

Taylor vs. Cook et al.

During the present term of the court, counsel for defendants in error moved to have the above stated case entered upon the docket for argument at the heel of the Flint Circuit, upon the ground that the writ of error was to the judgment of the chancellor attaching a defendant in an equity cause for contempt in the violation of an injunction, and, therefore, within the provisions of the act of 1870, allowing exceptions to decisions upon the extraordinary remedies in equity to be brought to this court and at once disposed of. The motion was not allowed, and the principle in the above head-note enunciated.

SPEER & STEWART, for the motion.

No appearance *contra*.

MARTHA S. TAYLOR, plaintiff in error, vs. GEORGE W. COOK et al., defendants in error.

Affidavits used upon the hearing of a motion for an injunction must be incorporated in the bill of exceptions; if attached to or embraced in the record, without any identification by the chancellor, the writ of error will be dismissed. (R.)

Injunction. Practice in the Supreme Court. Before the Supreme Court. January Term, 1874.

When this case was called, counsel for defendants moved to dismiss the writ of error because the affidavits used upon the hearing of the motion for injunction were not embraced in the bill of exceptions. The papers showed the following facts:

The certificate of the chancellor to the bill of exceptions states that it "contains all the evidence (with the reference to that certified with the record, and as a part of the same,) material to a clear understanding of the errors complained of, with the qualification above stated; and the clerk of the superior court of Spalding county is hereby required and ordered to make

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out a complete copy of the record in said case, together with a copy of the evidence introduced by the parties on the hearing before me, as a part of said record, and certify the same as such, and cause the same to be transmitted," etc. The bill of exceptions recited that certain affidavits were read before the chancellor, "which evidence introduced by the complainant and defendants, she (plaintiff in error) prays may be certified by the clerk of the superior court of said county, together with the bill and answer and cross-bill, and that the same may be a part of the record in this case, and be so certified, with leave to refer to the same with all other matters and things which may be certified as a part of said record, as a part of this, her bill of exceptions."

To the record of the case were attached numerous and voluminous affidavits, which were followed by the usual certificate of the clerk.

The court sustained the motion, enunciating the principle embraced in the above head-note.

D. N. MARTIN; T. W. FLYNT, for plaintiff in error.

SPEER & STEWART, for defendants.

ELBERT PEACOCK, executor, plaintiff in error, *vs.* JAMES D. EUBANKS, defendant in error.

The writ of error to a decision of the superior court must be returned to the next term of the supreme court after such decision is rendered, after allowing the various times prescribed by law for service, filing, transmission, etc., otherwise it will be dismissed. (R.)

Bill of exceptions. Practice in the Supreme Court. Before the Supreme Court. January Term, 1874.

When the above stated case was called, counsel for defendants moved to dismiss the writ of error because it was properly returnable to the last term of the court. The facts relied upon to sustain such motion were as follows:

Billups vs. Baynes.

The bill of exceptions was certified to by the judge on December 20th, 1872. Service was acknowledged on the 24th of the same month, and it was filed in office on the 25th. The return day to the July term, 1873, of the supreme court was June 17th, 1873. The bill of exceptions was certified to and transmitted by the clerk of the superior court on June 14th, 1873. It reached the supreme court and was filed in office on the 19th of the same month. It was therefore entered on the docket for this term.

The court sustained the motion, enunciating the principle embraced in the above head-note.

J. W. AVANT; W. S. WALLACE, for plaintiff in error.

S. HALL, for defendant.

JOEL A. BILLUPS, administrator, plaintiff in error, vs. ELBERT W. BAYNES, defendant in error.

1. It is the duty of counsel for plaintiff in error to prepare and attach to the bill of exceptions the certificate for the judge to sign, which such officer may modify as may seem to him proper under the facts of the case. (R.)
2. Where the judge attaches to the bill of exceptions the following certificate :

" May 24th, 1878.

"The court signs the foregoing as a bill of exceptions, with leave to attach the certificate prescribed, but the court does not certify the facts recited in the grounds for new trial to be correct, nor does it certify the facts stated in assignment of errors to be correct; these are but allegation made by one party.

J. JOHNSON, Judge, etc.

"Below put certificate."

And leaves a blank space for such certificate, followed by a second signature, and counsel for plaintiff in error fill up such blank with the certificate prescribed by statute, dating the same June 1st, 1878:

Held, that the date of the signing of the bill of exceptions, as recognized by this court, is May 24th, 1878, and the filing in office and service upon opposite counsel, must be made within fifteen and ten days from such date, respectively. (R.)

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Hines & Hobbs *vs.* The Brunswick, etc., Railroad Company *et al.*

Bill of exceptions. Practice in the Supreme Court. Before the Supreme Court. January Term, 1874.

When the above case was called, counsel for defendant moved to dismiss the writ of error, because the bill of exceptions had not been filed in the office of the clerk of the superior court within fifteen days, nor served upon them within ten days, from the date of the certificate of the judge.

The date of the filing in office and of service was June 10th, 1873. The remaining facts upon which the motion was based, will be found in the second head-note.

The motion was sustained, and the writ of error dismissed, the court enunciating the principles embraced in the above head-notes.

FLEMING JORDAN, for plaintiff in error.

C. L. BARTLETT ; W. A. LOFTON ; KEY & PRESTON, for defendant.

HINES & HOBBS, plaintiffs in error, *vs.* THE BRUNSWICK AND ALBANY RAILROAD COMPANY *et al.*, defendants in error.

THE BRUNSWICK AND ALBANY RAILROAD COMPANY *et al.*, plaintiffs in error, *vs.* THE FIRST MORTGAGE BONDHOLDERS OF THE BRUNSWICK AND ALBANY RAILROAD COMPANY *et al.*, defendants in error.

HENRY CLEWS & COMPANY, plaintiffs in error, *vs.* THE BRUNSWICK AND ALBANY RAILROAD COMPANY, defendant in error.

1. By consent of all the counsel interested in the cases upon the docket for a particular circuit, the order in which the cases are entered will be varied on the call, for the sake of convenience. (R.)
2. Upon special cause shown, cases will be transferred to the heel of the entire docket. (R.)

Pope *vs.* Tift *et al.*—Lockett *et al.*, *vs.* Kemp.

3. Under no circumstances will cases belonging to one circuit be injected into another circuit, or between other circuits. Injunction cases are governed by a law peculiar to them. (R.)

Practice before the Supreme Court. January Term, 1874.

Pending the argument of cases upon the Atlanta Circuit, O. A. Lochrane, Esq., proposed to take the following order in reference to the cases above set forth, being numbers five, six and eight of the Brunswick Circuit:

"It appearing to the court that the above stated cases are important to be determined before the hearing in their regular order, in furtherance of the rights of parties, and in view of rule 21st of this court, the said cases are hereby set down for a hearing at the heel of the Albany Circuit."

In submitting the motion, Mr. Lochrane stated that opposite counsel consented to such disposition of the litigation referred to, and joined with him in making the request embraced in said order; that the three cases arose from the same litigation, and would be argued together.

The motion was disallowed, and in rendering such decision, the principles contained in the above head-notes were enunciated.

O. A. LOCHRANE, for the motion.

No appearance *contra*.

WILLIAM A. POPE, administrator, plaintiff in error, *vs.* N. & A. F. TIFF *et al.*, defendants in error.

BENJAMIN G. LOCKETT *et al.*, plaintiffs in error, *vs.* MORGAN KEMP, defendant in error.

Where exception is taken to a judgment refusing an injunction, under the act of 1870, the clerk shall, within fifteen days from the service of the bill of exceptions, make out a transcript of the record and transmit the same *immediately* to the supreme court then in session, and if

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not in session, then to the very next session. If the transmission is not immediately made the writ of error will be dismissed. (R.)

Injunction. Practice before the Supreme Court. January Term, 1874.

These cases arose upon writs of error to the refusal of injunctions. The bill of exceptions in the first case was certified by the chancellor on January 10th, 1874, filed in the clerk's office of the superior court and certified by him on January 12th, and filed in the clerk's office of the supreme court on February 20th, 1874. Service was acknowledged on January 13th.

In the second case, the bill of exceptions was certified by the chancellor on October 23d, 1873, was filed in the clerk's office of the superior court on October 25th, certified by him on the 27th of the same month, and filed in the clerk's office of the supreme court on February 20th, 1874. Service was acknowledged on October 25th, 1873.

On motion of counsel for defendants, the writ of error in each case was dismissed, the court enunciating the principle embraced in the above head-note.

VASON & DAVIS; SMITH & JONES; W. A. HAWKINS, for plaintiffs in error.

HINES & HOBBS, for defendants.

JOHN W. PACE, administrator, et al., plaintiffs in error, *vs.*
CHARLES A. KLINK, administrator, et al., defendants in error.

By an act of the Legislature of this state, passed in 1850, the name of Mathew R. Brown, of the county of Muscogee, was "changed to that of Mathew Downer, and it was enacted that he be entitled to all the rights and privileges that he would have been entitled to had he been born the son of Joseph Downer, of the county of Muscogee, and be made capable by this act of taking, receiving and inheriting all manner of

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property under the statute of distribution of this state, so far as relates to the estate of the said Joseph Downer." The son thus adopted died before the said Joseph, leaving children:
Held, that in the distribution of the property of Joseph Downer, the children of Mathew stood in the place of and represented the father and took whatever of said estate he would have taken if living.

Parent and child. Distribution. Representation. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

The charge of the court, taken into connection with the facts set forth in the above head-note, reports this case. The court charged the jury "that the act of 1850, to change the name of Mathew R. Brown to Mathew Downer, and to make him a legal heir, did not make the children of Mathew Downer the heirs of Joseph Downer, the said Mathew, their father, having died before the said Joseph." To this charge the complainant excepted.

A verdict was returned in accordance therewith for the defendant.

Error is assigned upon the above ground of exception.

HENRY L. BENNING; J. M. MCNEIL, for plaintiffs in error.

INGRAM & CRAWFORD; CHAPPELL & RUSSELL; THORNTON & GRIMES, for defendants.

McCAY, Judge.

The question in this case turns entirely upon the meaning of the act of 1850. The presumption is that it was passed at the request of Joseph Downer, and it is to be construed in that view, since it cannot for a moment be supposed that the legislature would pass such a law except at the request of the person whose estate and family it operated upon. The act gives to Mathew not only the name of Downer, but declares he shall have all the rights and privileges that he would have had had he been born the lawful son of the said Joseph. Was

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it one of these rights and privileges that his children should represent him in the disposition of the estate of Joseph Downer? Would he be clothed with the full relation of a son to Joseph, if dying before him, he could not rely upon the children of his loins standing in his place and representing him in the estate of that father as they would have done had Downer been in fact the father? It is not a question of heritable blood. Mathew was by the act *made* the son, he was clothed with the rights of a son, and had cast upon him the duties of a son. He was made the heir, and if his adopted father had died first he would have taken as son and heir.

An heir is one who takes an estate by operation of law on the death of the owner. It is not necessary that the heir shall be of the blood of the deceased. Our statute, in terms, makes the wife and the husband heirs of each other, and if the law were to provide that at the death of any one his estate should go to his nearest neighbor, that neighbor would be the heir. The act of 1850, declaring Mathew to have the same rights and privileges as he would have had had he been born the son of Joseph, goes further and declares in terms that he shall be capable "of taking, receiving and *inheriting* all manner of property under the statute of distributions, so far as relates to the estate of said Joseph Downer." Taking, therefore, both clauses of the act together, Mathew was, so far as Joseph and his estate was concerned, made the *lawful* son and *lawful* heir of Joseph. It was contended, in argument, that by the common law an heir must of necessity be of the *blood* of the ancestor. In the feudal sense of the words that is perhaps true. Indeed, technically, no one, not even a child, is heir by the common law, except as to lands. And that heir is the eldest son who, under the grant of the lord who gave the estate, takes the place of the father in the service under which the estate is holden. But under our law all take under the statute of distributions; land as well as personal estate is assets—and heirs and distributees are synonymous words. The very act under consideration provides that Mathew shall be capable of *inheriting* under the statute of distributions.

- Pace *et al.* vs. Klink *et al.*

As to personal property there was at common law no heir; those who took it took as distributees. But our law every-where recognizes those who take under the statute of distributions as heirs, whether they be of the blood or not. The words are, "the husband is *heir* of the wife:" Code, 24. Assuming, then, that Mathew was made by this act the law-ful son, and declared capable of inheriting, it seems clear to us that under paragraph 4 of the same section, "the lineal descendants of children stand in the place of their deceased parent," the children of Mathew stand in his stead. It is said that the lineal descendants in all cases take, not through the father, but by virtue of their being of the blood of the ancestor, and that they are put in the place of the father merely to regulate the share they take. But this is not en-tirely true. They must, in all cases where they take *per stirpes* account for advancements to their father or lineal an-cestor, and Burns, Ec. Law, volume IV., page 338, says: "The reason for this is, that they do not take in their *own right* but as representing their father deceased." And again, "in this regard the issue stand in the place of the father, *claim under him*, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share."

Again, our law provides, "If a legatee die before the tes-tator, or is dead when a will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse but shall vest in the issue in the same proportions as if inherited from their deceased ancestor:" Code, section 2462. It seems to us that an act of the legislature presumed, as we have said, to have been procured by Downer declaring Mathew the son, with all the rights and privileges of a son, including the right to inherit, may far more fairly be said to include in this the right of his children to represent him than it can be said that a legacy to one who dies before the testator, shall be said by presumption to include the children of the deceased legatee.

In the case of *Shelton vs. Wright, administrator*, 25 Georgia,

Wessolowski *vs.* Gilbert. -

636, this court held that the children of Sheldon's blood inherited from the adopted son, at least so far as property was concerned, that came from the adopting father, the principle of the decision, being that Sheldon, having procured the adopting act, and having thus made the person adopted a son and heir of his property, he *ipso facto* made his other children the brothers and sisters of the adopted child, so far as his, Sheldon's, property was concerned. And so here, so far as the property of Joseph Downer is concerned, we think the adopting act makes the children of Mathew the representatives of the father in case Mathew should die first. And this, as every man must feel, is the natural common sense meaning of an adopting act. In most cases of the kind it is a mere mode of legitimating the real fruit of the father's loins, and it is no unfair presumption that it is the intent of the father, so far as he and his property is concerned, to make the relation exactly what it would have been had there been a lawful and actual relation of parent and child.

We do not think refined arguments, based on obsolete rules and feudal necessities, ought to be permitted to thwart the purposes of one who, through affection or a sense of justice, has thus undertaken to establish the relation of parent and child according to law, between himself and another.

For these reasons we think the judgment in this case ought to be reversed.

Judgment reversed.

THE STATE, *ex rel.*, CHARLES WESSOLOWSKI, plaintiff in error, *vs.* WILLIAM H. GILBERT, defendant in error.

1. The judge of the county court of Dougherty county has the power under the act of February 5th, 1878, to appoint the clerk of said court.
2. Such power could have been exercised from the time of the passage of the act, although the original act organizing the court provided that the clerk of the superior court of the county shall be *ex officio* clerk of said court.

Wessolowski vs. Gilbert.

Quo warranto. County Court. Clerk. Officers. Before Judge STROZER. Dougherty county. At Chambers. July 17th, 1873.

Wessolowski, claiming to be *ex officio* clerk of the county court, petitioned the judge of the superior court of the Albany Circuit, for the writ of *quo warranto*, requiring Gilbert to show cause by what authority he was exercising the duties of the office of clerk of the county court of said county, and collecting the fees and emoluments thereof.

Leave was granted to file the petition, and the writ of *quo warranto* ordered to be issued.

Gilbert answered, substantially, as follows: At the date of the passage of the act of August 24th, 1872, creating the county court for Dougherty county, he believes the relator was acting as the clerk of the superior court of said county. Said act provided in the 7th section thereof that the clerk of the superior court should be *ex officio* clerk of the county court, under which relator acted for some time. But said act was amended by act of February 5th, 1873, by the 5th section of which it was provided that the clerk of said county court should be appointed by the judge thereof. Under this authority respondent was appointed by the judge of said court, and was duly qualified, etc. He then entered upon the discharge of the duties of the office, took possession of the books and papers, and is now in full control of all of the insignia of office, claiming to be legally entitled thereto. He submits that the 7th section of the act of August 24th, 1872, was repealed by the amendment of February 5th, 1873.

The court held that the respondent was rightfully in office, and dismissed the information. To which ruling relator excepted.

WILLIAM E. SMITH, for plaintiff in error.

VASON & DAVIS, for defendant.

Weasolowski *vs.* Gilbert.

TRIPPE, Judge.

1. The act of August 24th, 1872, creating the county court of Dougherty county, provided in the 7th section thereof that the clerk of the superior court of said county shall be *ex officio* clerk of the county court. The 5th section of the act of February 5, 1873, amending the former act in several particulars, enacts that the judge of said county court shall have power and authority to appoint a clerk of said court, whose duties and liabilities shall be the same as now required of the clerk of the superior court, by the act of which this is amendatory, who shall take the oath, etc., and give bond with security in the sum of \$2,000 00. The act of 1872 required no oath or further bond of the clerk of the superior court. Under this last act the judge of the county court appointed the defendant in error clerk of said court, and plaintiff in error, who is clerk of the superior court, contests his right to said office, and denies that the act of 1873 intended that the judge should exercise this power until a vacancy occurred, and if it did, it was unconstitutional. We think that, under a fair construction of the act of 1873, the judge of the county court did have the power to make the appointment at the time he exercised it. There was no limitation on him as to the time when he could so do. The first act cast the duties on the clerk of the superior court, as *ex officio* clerk of the county court, and the legislature may have thought that the office did not have the guarantees required by the last act. The question might arise, could the act of 1872 require the performance of new duties in another court of an officer already elected, qualified and commissioned? Or, if it could, did the bond he had given as to one office extend to the performance of the duties of another office, which had been created after his qualification, and after he had given bond and security for the performance of the duties of the first? But be this as it may, on the face of the act of 1873 it appears the intention of the legislature was that it should go into effect at once as

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to all its provisions. Certainly all provisions of the other sections went into immediate operation.

2. This being so did that make it unconstitutional? Did the act of 1872 confer such a right in the office, or right of property to plaintiff, or did it amount to a contract with the plaintiff in error, that it could not be changed or repealed? If the act of 1872 had been repealed the office would have expired with the court. It has never been doubted in this state that an office created by the constitution may be abolished by the people in convention. If the office be the creation of the legislature, it may be abolished by legislation: 5 W. & S. 418; 6 Sergeant's R., 322; 10 Howard, 414. The case of *Allen vs. McKeen*, 1 Sumner, 277, seems to be in conflict with this, but without pointing out the difference between that case and this, as it grew out of the rights of corporations under a charter, I will only say that in *Dart et al., vs. Houston et al.*, 22 Georgia, 535, Judge McDONALD, in the opinion he wrote, said "We cannot recognize it, (*Allen vs. McKeen*) as authority here." In the case of *The City Council of Augusta vs. Sweeny*, 44 Georgia, 463, it was held that an incumbent of an office created by the authorities of a municipal corporation, does not have such an interest in the salary as that the corporation cannot at its discretion abolish the office, and by so doing deprive him of his right to tender his services and demand his salary for the full time for which he was elected.

The construction we give to the act of 1873 is such that it operated to repeal the 7th section of the act of 1872, and thereby deprive the plaintiff in error of any claim to the office under said repealed section. If the whole act had been repealed the court and the clerkship would have both fallen. Had the act of 1873 cast the duties of the clerk on the judge, or made him, as did the former county court act of 1866, *ex officio* clerk of his own court, it would have been a repeal of the 7th section of the act of 1872. So did the 5th section of the act of 1873, by giving power and authority to the judge of the county court to appoint the clerk of his court,

Pipkin vs. Grace.

by being contrary to and in conflict with said 7th section, abrogate it, under the well known maxim that the last act repeals a former conflicting act. In this last act there was a general repealing clause.

Judgment affirmed.

PHILIP PIPKIN, plaintiff in error, vs. THOMAS GRACE defendant in error.

When a judgment was obtained in 1866 on a promissory note made in 1860, and under the relief act of 1868 the defendant filed an affidavit to reduce the debt, on the ground that in 1863 he had tendered to the plaintiff the whole amount due, which he refused, and that the defendant had thereby lost the sum tendered:

Held, that there was nothing in the facts stated creating such an equity between the parties as justified the reduction of the debt, and it was not error in the court to order the execution to proceed.

Relief Act of 1868. Tender. Before JACOB WATSON, Esq., Judge *pro hac vice*. Pulaski Superior Court. April Term, 1873.

At the April term, 1866, of Pulaski superior court, Thomas Grace recovered a judgment against Philip Pipkin for \$214 50 principal, besides interest and costs, on a note made "prior to the year 1860." Execution was issued thereon and a levy made. The defendant filed his affidavit under the relief act of 1868, to open said judgment, setting up that in the fall of 1862 he tendered to the plaintiff on two separate occasions the whole amount of said debt, and he refused to receive the same, by reason of which the money tendered was lost to the defendant; that after said tenders defendant sent the amount due to the plaintiff, who again refused to accept the same.

The affidavit failed to state in what currency the tenders were made. Upon demurrer it was dismissed, and defendant excepted.

L. C. RYAN, for plaintiff in error.

Brown *vs.* Patterson.

WARREN & GRICE, by brief, for defendant.

McCAY, Judge.

It does not appear whether the tender set up was in gold and silver or Confederate notes. If it was the latter, it was no defense either in law or equity. The promise to pay was in gold and silver. Why should an offer to pay in Confederate money beget any equity. There is no allegation as to the circumstances of the tender, as that defendant, under some contract with the plaintiff, was induced to sacrifice property to get Confederate money, and that defendant, by refusing to receive it, had damaged him, setting forth the nature and extent of the damage, etc. Nothing appears here but the simple tender. If the tender was gold or silver, or legal tender notes, then the defense, for what it was worth, to-wit: the interest, was good at law, and should have been set up before judgment. In no event, so far as the facts are set forth, can we see any equity which authorizes the court to go behind the judgment.

Judgment affirmed.

JOHN T. BROWN, plaintiff in error, *vs.* ROBERT M. PATERSON, executor, defendant in error.

1. Where no plea of *lis pendens* is filed, a record showing the pendency of a former suit between the same parties, involving the same issue, is inadmissible.
2. Where the issue upon trial was whether the defendant, sought to be ejected as a tenant holding over, had, in good faith, abandoned the possession of the premises in dispute at the expiration of his term, and afterwards rented the same from the person under whom he then claimed to hold, or whether he colluded with such person and retained possession in violation of his rent contract with the plaintiff, it was not error in the court to refuse to charge that "if the defendant quit possession, and after the time had expired, wrongfully took possession, he might be an intruder, but the plaintiff cannot recover in this form of action."

Brown vs. Patterson.

Pleading. *Lis pendens*. Evidence. Landlord and tenant. Before Judge CLARK. Sumter Superior Court. October Ad-journed Term, 1872.

Robert M. Patterson, as executor upon the estate of Malachi Patterson, deceased, instituted proceedings to eject John T. Brown, as a tenant holding over, from certain lands in Sumter county. The usual counter-affidavit was filed and bond given.

Upon the trial of the issue thus formed the defendant sought to show the pendency of a former suit involving the same issue, by the introduction of the record of proceedings in equity by bill, in which plaintiff was complainant, and the defendant one of the defendants. Upon objection, this evidence was excluded, and defendant excepted.

The evidence made the following case :

The defendant rented the premises in dispute for the year 1870, from plaintiff's testator, for \$750 00 per annum, for which he gave his notes. The defendant insisted that the plaintiff, who was acting as the agent for testator, then in life, represented that there were three hundred acres of open land on the place, which statement was untrue. Plaintiff denied ever having made such representation, and asserted that he expressly notified the defendant that he rented upon his own knowledge of the premises, as he was much better acquainted therewith than was the plaintiff. Several small payments were made on the notes during the year.

In February, 1871, the defendant was found on the premises. He refused to deliver possession thereof to the plaintiff, claiming to hold under one Horne. He insisted that at the expiration of his term he had abandoned the place; that he returned on January 5th, 1871, and found Horne in possession; that he then, in good faith, rented from Horne. The plaintiff, upon the contrary, insisted that the defendant never had delivered up possession, and that this claim of holding under Horne was a mere matter of collusion between the two, by which the defendant might be enabled to retain possession.

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Upon these two points the evidence was very conflicting.

The defendant requested the court to charge the jury as follows: "If the defendant quit possession, and after the time had expired, wrongfully took possession, he might be an intruder, but the plaintiff cannot recover in this form of action."

The court refused so to charge, and defendant excepted.

The jury found for the plaintiff and also \$775 00 for rent. The defendant moved for a new trial, because the court erred in the aforesaid exclusion of testimony, and in the refusal to charge. The motion was overruled, and defendant excepted.

HAWKINS & HAWKINS, for plaintiff in error.

J. A. ANSLEY, by R. F. LYON, for defendant.

WARNER, Chief Justice.

This was a proceeding to eject a tenant who was holding over from certain described rented premises after his term had expired under the rent contract. The defendant filed a counter-affidavit, denying that he was then holding the premises, either by rent or lease, from the plaintiff. On the trial of the issue thus formed, the jury found a verdict for the plaintiff, and also found the sum of \$775 00 due for rent. A motion was made for a new trial, on the several grounds stated therein, which was overruled by the court, and the defendant excepted.

1. There was no error in ruling out the record offered in evidence to show *lis pendens*, under the facts of this case. The defendant had filed no plea that a former suit was pending between the parties, involving the same subject matter of the rent contract, and the evidence was properly rejected for that reason, even if it would have been otherwise admissible.

2. There was no error in refusing to give in charge the second request of the defendant in relation to Horne and Brown being intruders, under the evidence disclosed in the record. There is no dispute as to the fact that the defendant rented the premises from the plaintiff for the year 1870, and occu-

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pied the same for that year, and continued in the possession thereof during the year 1871. The question in dispute between the parties at the trial was whether the defendant abandoned the rented premises in good faith at the end of his term, and afterwards rented the same from Horne, under whom he claimed to hold for the year 1871, or whether he colluded with Horne and retained the possession of the premises, in violation of his rent contract with the plaintiff. In relation to this point in the case, the evidence was conflicting, but the jury found a verdict for the plaintiff, and, in our judgment, there is ample evidence in the record to sustain it. The questions involved in the issue on the trial between the parties was fairly submitted to the jury by the court in its charge, and we will not disturb their verdict.

Let the judgment of the court below be affirmed.

SARAH JERNIGAN, executrix, plaintiff in error, vs. NEAL CARTER, defendant in error.

1. A plea that the plaintiff in a suit was dead at the time of the commencement of the action may be filed at any time before judgment, it being made to appear that the fact pleaded has just come to the knowledge of the defendant.
2. A plea in abatement and a plea of the general issue may be both filed at the same time, but the plea in abatement should be first disposed of.

Practice in the Superior Court. Pleading. Before Judge JAMES JOHNSON. Marion Superior Court. April Term, 1873.

Neal Carter brought complaint against Sarah L. Jernigan, as executrix of Ptolemy Jernigan, deceased, on a promissory note dated March 5th, 1861, for the sum of \$794 93. Pou & Little, attorneys, were marked for the plaintiff, and M. H. Blandford, attorney, for the defendant. When said cause was called M. H. Blandford announced ready for plaintiff. B. B. Hinton, attorney for defendant, moved for a continuance, stating in his place as a reason, that he had only been retained a

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few days before said court; that he was informed by the defendant that his services were required in conjunction with said M. H. Blandford; that he had relied on said M. H. Blandford to prepare the defense in said case; that he did not know but what said Blandford was of counsel for defendant until said cause was called; that owing to these facts he was not prepared to proceed with the trial of said case. The court overruled the motion for a continuance, and defendant, by her counsel, then and there excepted..

Defendant then craved oyer of the note. M. H. Blandford stated that said note had been lost. Plaintiff opened his case, and introduced M. H. Blandford, who swore that the original note was placed in his hands by Measrs. Pou & Little; that he drew the declaration and filed the same as a matter of courtesy for said Pou & Little; that the copy note attached to the declaration was a correct copy of the original.

Defendant objected to said proof, because the absence of said note had not been sufficiently accounted for. The court overruled said objection, and admitted testimony, to which ruling defendant excepted. Blandford further testified that as defendant had filed a plea denying that said plaintiff was in life at the commencement of said suit, he would state that Neal Carter was in life; that he was the grand-son of Jesse Carter, to whom said note was made payable. Plaintiff closed his case.

Defendant's counsel was then asked by the court, how many pleas were filed? He replied, two; the general issue and a plea in abatement to the effect that the plaintiff was dead at the commencement of the suit. Plaintiff's counsel moved to dismiss said plea in abatement, which motion was sustained by the court. Defendant then moved to amend his pleas by withdrawing the plea of the general issue, and relying alone upon the plea in abatement. The court overruled the motion to amend, to which ruling defendant excepted. Defendant moved further to amend by filing the plea of *ne unques executrix*, her counsel stating that he did not know until then that she was not executrix. The court admitted the right to

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amend, but refused a moment's time in which to draw the plea, to which refusal of time defendant excepted. The court instructed plaintiff to take a verdict, which was done, for the whole amount of principal and interest on said note.

Error is assigned upon each of the aforesaid grounds of exception.

B. B. HINTON & SON, for plaintiff in error.

M. H. BLANDFORD, for defendant.

McCAY, Judge.

1. If the facts set forth in the plea tendered as an amendment be true, a judgment in favor of either the plaintiff or defendant would be void, since it is absurd to say that anything can be determined in a suit where one of the parties was dead at the commencement of the suit. If this was not known to the defendant when the suit was brought, and she has brought it to the knowledge of the court as soon as she discovered it, she is in no *laches*, and she was entitled to her amendment.

2. We do not think it was necessary, under our law, to withdraw the plea of general issue before putting in this plea. Nor would this be true even if it were a simple plea to the jurisdiction of the court, or any other plea, even a dilatory one. If the facts presented showed a right to put in the plea at the second term, that was, in our judgment, sufficient. It was not necessary to withdraw the plea to the merits. Under our law strictly, *all* pleas must be filed at the first term—both pleas in bar and pleas in abatement, and if so, they must often be both on the record at once: Code, secs. 3452, 3461. And the statute specially provides that no part of an answer (plea) shall be stricken because it is in contradiction of some other: Code, section 2452. It will be noted also that even as to pleas to the jurisdiction, whilst it is provided that a plea to the merits waives it, yet it is also in the same section (3461) provided that this shall not be so if the plea to the

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jurisdiction be made at the same time. Perhaps the logic of things may require that the record ought not to show a plea to the merits until it is settled that there is a proper case in court. But that is the same logic which required pleas to be consistent with each other, and the whole structure of that logical system which common law lawyers laud so highly has long since been dispensed with in Georgia. We see no objection, under our law, to filing a plea to the merits and a plea in abatement at the same first term. The plea in abatement ought to be first disposed of; but to require one to withdraw his plea of general issue when, after the first term, facts occur to authorize a plea in abatement, is, as it seems to us, not only not required by the statute but is contrary to the entire tenor of our system of pleading. We do not discuss the other question, *to-wit*: whether the judge was right in refusing to delay the progress of the cause whilst the plea was being written. Such things must necessarily be largely in the discretion of the court. If the facts have at that moment become important, or been just discovered, we think the principles of justice would require a few moments delay, but if the necessity for the plea is from the neglect of the party, we should hesitate to interfere. In this case it seems absurd to pretend that the defendant has just discovered she is executrix, and we would not interfere. She has been a most unreasonable time in finding out what her office was. We say the same in reference to the motion to continue. If the defendant was without counsel it was her own fault, and the mistake was not to be used to delay the plaintiff. We, however, reverse the judgment for what we think was error, refusing the plea denying that plaintiff was in life at the commencement of the suit.

Judgment reversed.

Stephens vs. The State of Georgia.

LEROY STEPHENS, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

1. On the trial of an indictment for an offense not capital a verdict of guilty is not illegal because it contains a recommendation of the defendant to mercy.
2. Nor is such a verdict a cause for a new trial unless it appear that the jury may have been misled by the charge of the court on that point.

Criminal law. Verdict. Recommendation to mercy. Before Judge BUCHANAN. Coweta Superior Court. September Term, 1873.

Stephens was placed on trial for the offense of bestiality, alleged to have been committed on September 2d, 1873. The defendant pleaded not guilty. The jury found him guilty, and recommended him to the mercy of the court. A motion for a new trial was made because the verdict was illegal. The charge of the court does not appear. The motion was overruled, and defendant excepted.

P. F. SMITH, by W. F. WRIGHT, for plaintiff in error.

A. H. Cox, solicitor general, for the state.

TRIPPE, Judge.

1. In the case of *Wair vs. The State*, decided at the present term, it was held that in a murder case a verdict of guilty which was not founded on circumstantial testimony, was not vitiated by a recommendation to mercy. In such cases the judgment is fixed by law—it is absolute and not within the power of the jury by any recommendation, or within the discretion of the court, to change it. So it is in this case. Upon the rendition of a verdict of guilty, the power of the jury ceased, and there was no discretion in the court, not even a margin wherein he could grade the term of imprisonment. We do not mean by this to say that such a recommendation, in cases where there is a minimum and maximum period to

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the time of imprisonment to be fixed by the discretion of the court, would vitiate a verdict. It would be difficult, if not impossible, to give a good reason why the verdict should be set aside on this account. It has been held in several cases of capital offenses which were not murder that a jury has the right to recommend in the verdict a commutation from the death penalty to imprisonment for life; and that it would be binding on the court whether the verdict was upon circumstantial testimony or not: See *Stallings vs. The State*, 47 *Georgia*, 572; *Johnson vs. The State*, 48 *Ibid.*, 116; *West, alias Johns, vs. The State*, 49 *Ibid.*, 451. In those cases it was also held that a verdict of guilty, *with a recommendation to mercy*, was an illegal verdict. The reasons for so holding in cases where the jury has such a power, the power to direct the commutation, do not apply to one like this. The case first referred to decides the principle on which this judgment rests, and controls this case.

2. Had there been any charge of the court on this point of a character to mislead the jury, the case might have been different. But there is no complaint of this kind.

Judgment affirmed.

PETER McLAREN, plaintiff in error, *vs.* OSBORNE A. LOCHRANE, defendant in error.

There was no such abuse of the discretion of the court in granting a new trial in this case as to justify this court in reversing the judgment.

New trial. Before Judge STROZER. Dougherty Superior Court. April Adjourned Term, 1873.

Lochrane brought complaint against McLaren on an account for \$500 00, for professional services rendered. The record fails to disclose any plea. The evidence was substantially as follows:

McLaren *vs.* Lochrane.

Richard F. Lyon, sworn for plaintiff: Some time in the year 1869, or earlier, the defendant called on witness and the plaintiff in Macon, representing that he was involved in certain litigation in Dougherty county, in which he desired to employ them as counsel; that he wished them to accompany him to the city of Albany on the next day, when, if the case was settled, and no further services were required of them, he would pay to each \$250 00; that if further labor was required, the amount of compensation was to be fixed by subsequent agreement. Upon this contract, witness and plaintiff went to Albany on the next day with the defendant, but shortly after their arrival at that point, plaintiff was compelled on account of indisposition to retire to his room, where he remained during the entire day and night. The whole of the day and a large portion of the night were occupied in an attempt to settle the litigation. In all propositions that were made, as to which witness and defendant had any doubt, they went to plaintiff's room and there conferred with him. No other service than these consultations was rendered by plaintiff. No settlement was effected. The litigation referred to grew out of a bill filed by Eugenia Beall against defendant as administrator of Davis Pace, deceased. The services performed by plaintiff, considering the amount and nature of the litigation, were worth \$250 00.

Peter McLaren, the defendant, sworn: Employed plaintiff and Mr. Lyon as the administrator of the estate of Davis Pace, and not individually. The contract, with this modification, was correctly stated by the witness for the plaintiff. Corroborates plaintiff's evidence as to the nature and amount of the services rendered, but not as to their value.

John A. Davis, for defendant, sworn: He assisted in the effort to bring about a settlement of the litigation above referred to. Plaintiff rendered no service that he saw. Mr. Lyon did all the work. To do the labor that was expected of plaintiff, he would consider \$250 00 a reasonable fee.

Gilbert J. Wright, for defendant, sworn: Was counsel for Mrs. Beall in the litigation above referred to. Was inti-

Bright *et al.* vs. Adams *et al.*

mately connected with all the negotiations that were made for a settlement at the time referred to in the evidence. Plaintiff rendered no service to defendant that he saw. Mr. Lyon did all the work. The litigation involved about \$28,000 00.

The jury found for the plaintiff \$20 00. He moved for a new trial, because the verdict was contrary to the evidence. The motion was sustained, and defendant excepted.

WRIGHT & WARREN, for plaintiff in error.

LYON & IRVIN, for defendant.

MCCAY, Judge.

This case turns solely on the evidence, and we think the verdict is justified by it. Who shall say that Judge Lochrane's presence at Albany, and his advice, when consulted at his sick room, was not as effective and useful to the defendant as if he had with his own hand done the necessary writing, and with his own mouth joined in the negotiations?

Judgment affirmed.

HARVEY BRIGHT *et al.*, plaintiffs in error, vs. CALEB C. ADAMS *et al.*, defendants in error.

An instrument which has all the formalities of a deed, except the following words in the concluding part of it: "This deed is not to go into effect until after the death of said B. Bright, (the grantor,) he being very ill," under the 2395th section of the Code, is a testamentary paper.

Deed or will. Before Judge KIDDOW. Randolph Superior Court. November Adjourned Term, 1873.

For the facts of this case, see the decision.

WORRILL & CHASTAIN; RICHARD H. CLARK, for plaintiffs in error.

Bright et al. vs. Adams et al.

JOHN T. CLARKE, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants praying for an injunction, which was granted by the presiding judge, and the defendants excepted. The main question made before this court on the argument was whether the instrument set forth in the record, executed by Benjamin Bright to Harvey Bright on the 1st day of June, 1871, purporting to convey a certain described tract of land, is a deed, in contemplation of the law, or a testamentary paper. The instrument has all the formalities of a deed, attested by two witnesses, except the following words in the concluding part of it: "This deed is not to go into effect until after the death of said B. Bright, he being very ill." In our judgment, according to the rule declared by the 2395th section of the Code, this is a testamentary paper. It is very clear from the words contained in the instrument as above quoted, that it was not the intention of the parties (whatever may have been the form of it,) that it should take effect until after the death of Benjamin Bright, the maker of the instrument; and if it was not to take effect and pass an interest in the land to Harvey Bright until after the death of Benjamin Bright, then the instrument cannot operate as a deed, but must necessarily be considered a testamentary paper. Although it is called a deed, it is expressly declared on its face that it was not to take effect until after the death of the maker of the instrument for any of the purposes therein expressed, and there is no evidence in the record of its delivery during his life. We find nothing in the record which will authorize this court to control the discretion of the court below in granting the injunction.

Let the judgment of the court below be affirmed.

The Atlantic, etc., Railroad Company *vs.* The Florida, etc., Company.

THE ATLANTIC AND GULF RAILROAD COMPANY, plaintiff in error, *vs.* THE FLORIDA CONSTRUCTION COMPANY, defendant in error.

1. The plaintiff in an attachment may, by serving the defendant with notice and by the other methods provided by law, get a general judgment against the defendant and his property, but in the distribution of money raised from the sale of property attached he is still an attaching creditor, and the money is to be divided according to the priorities of the several attachments, to-wit: according to the date of the levies.
2. Continuances are in the discretion of the court, and this court will not interfere with that discretion if the party complaining is wanting in proper diligence.

Attachment. Lien. Judgment. Continuance. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.'

The Atlantic and Gulf Railroad Company and the Florida Construction Company sued out attachments against the Jacksonville, Pensacola and Mobile Railroad Company, which were levied upon three steamboats. The boats were sold and the money paid into the registry of the court for distribution. The levy of the attachment of the Florida Construction Company was the first in point of time. Judgments were obtained at the same term of the court.

The Florida Construction Company moved to have the proceeds of said property paid over to their judgment. The Atlantic and Gulf Railroad Company tendered an issue alleging that it claimed a general judgment on account of having the acknowledgement of service of the agent of the Jacksonville, Pensacola and Mobile Railroad Company on its attachment; that the court had refused to allow such a judgment to be taken, which ruling had been carried by writ of error to the supreme court. It therefore prayed that said fund be not distributed until the decision of the supreme court be rendered in the cause aforesaid.

It also alleged that the claim of the Florida Construction Company had been paid.

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Issue was joined on the last ground. What became of the first the bill of exceptions does not disclose, but it is supposed to have been dismissed on demurrer. A motion for a continuance was then made by the Albany and Gulf Railroad Company, in order to procure the testimony of Chase, a non-resident member of the firm of the Florida Construction Company. To this end it showed by L. E. Keefe, that soon after the boats were attached, he met said Chase in New York, just as he was landing from the steamer Scotia on her return from Europe, and told him of said attachments; that Chase replied that he was sorry for it, as he had negotiated the bonds of the Jacksonville, Pensacola and Mobile Railroad Company in Europe, and thought that the case could be settled with the proceeds of the same. Further, that he, Keefe, was the agent of the Jacksonville, Pensacola and Mobile Railroad Company at Columbus, but could not say whether the claim of the Florida Construction Company had been paid or not, and could not say that he could prove that the debt was paid.

The motion for a continuance was overruled, and the Atlantic and Gulf Railroad Company excepted.

The jury found the issue of payment in favor of the Florida Construction Company, and the fund was accordingly distributed, to the exclusion of the Atlantic and Gulf Railroad Company. Whereupon it excepted.

Error is assigned by the Albany and Gulf Railroad Company upon the above grounds of exception.

HENRY L. BENNING; LOUIS F. GARRARD, for plaintiff in error.

R. J. MOSES, for defendant.

McCAY, Judge.

1. It was not error to refuse to continue the issue until it was finally determined whether the Atlantic and Gulf Railroad was entitled to a general judgment. Such a judgment, if obtained, would not defeat the priority of the Construction

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Company so far as relates to the property attached. Both these creditors are attaching creditors of the defendant, and the lien of each upon the property attached is, as provided by section 3255 Irwin's Code, to be determined by the date of the levy. True, it is provided that an attaching creditor may, by serving notice, or by replevy, or by the defendant coming in and defending on the merits, have a general judgment, and this is to have the "same force and effect" as if there were personal service. But this language is to be taken in connection with the provisions of section 3255 Irwin's Code, "that the lien of an attachment is created by the levy and not the judgment on the attachment, and in case of a conflict between attachments, the one first levied shall be first satisfied; but in a contest between attachments and *ordinary* judgments or suits, it is the judgment and not the levy which fixes the lien."

A judgment obtained by giving the ten days' notice, as provided by section 3233 Irwin's Code, is in no fair sense an ordinary judgment. It is commenced by attachment—the defendant may be notified only ten days before final judgment, and the *fi. fa.* must be first levied on the property attached. It would be, we think, bad public policy to permit one attaching creditor thus, by connivance with the defendant, to divest the lien of the first levy, and we do not feel disposed to give the language of the law that construction, as we cannot suppose the general assembly to have so meant, without clear language to that effect. As to the property of the defendant other than the attached property, the lien of the judgment dates from the judgment; but as to the attached property, the rights of the attaching creditors—including the creditor who has got his attachment enlarged—are fixed by the levy.

2. Upon the other point we are not prepared to say the judge was not right. The evidence is at best only suggestive that if the parties had time they might prove payment, but is very inconclusive. The agent may have never got the money; he may have only made the arrangement, or if he got the money

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he may, as would be his duty, have fulfilled his trust by delivering it to his principal. Besides, the Atlantic and Gulf Railroad was bound to know that this issue would come up. This was the judgment term, the money was in the hands of the officers of court, and a motion for its distribution was to be expected. The information Keefe had should have been followed up so as that it could have been at least stated what the truth was. As it is, the matter is pure conjecture.

Judgment affirmed.

EDWARD C. HODGES, plaintiff in error, vs. ATLANTIC AND GULF RAILROAD COMPANY, defendant in error.

Under a proper construction of sections 8149, 8369 and 8406 of the Code, when considered together, an action cannot be brought in the superior court against a railroad company by merely serving the written notice and filing the same in the clerk's office without other pleadings.

Railroads. Pleadings. Before Judge HARRIS. Clinch Superior Court. October Term, 1873.

Hodges commenced suit against the Atlantic and Gulf Railroad Company by serving upon its agent at station No. 11, in Clinch county, a notice to the effect that on July 5th, 1873, the defendant had damaged him by killing one of his oxen, and by severely injuring another; that this damage was caused by the running of cars on its road; that desiring a legal assessment of the damages sustained by him, which he alleges to be \$100 00, he requires the defendant to be and appear at the superior court to be held on the first Monday in October next, to show cause, if any exist, why the damage shall not be assessed. No process was attached to this paper. A copy was served upon the agent heretofore mentioned.

On demurrer, the proceeding was dismissed, and plaintiff excepted.

J. L. SWEAT, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

It is true, that in *Jones vs. The Central Railroad and Banking Company*, 18 *Georgia*, 247, it seems to have been the opinion of a majority of the court that under the act of 20th February, 1854, suit against a railroad company must have been brought in the form prescribed by that act. That decision was made before the passage of the act of 1856. This last mentioned act gave all the rights as to suing railroads in the county where the damage was done that were given by the act of 1854, and further gave the right and prescribed how service might be effected in the usual way by issuing process and requiring service by the sheriff. Then there were the further acts of 1859 and 1869, 1862 and 1863. Under all these enactments, as now embodied in sections 3049, 3369 and 3406 of the Code, it was held, in the *Georgia Railroad and Banking Company vs. Monroe*, 49 *Georgia Reports*, 373, that this notice was not a condition precedent to a suit in the superior courts against a railroad, no matter where the suit is brought. As by these last two sections an unconditional right is given to bring the action in the county where the cause of action originated or the injury occurred, and as it is therein provided how service may be perfected, we think the proper construction to be given them is that the notice mentioned in the act of 1854, section 3049, Code, is not only dispensed with, but that the action in the superior court, at least, should be commenced in the usual form by petition and process, and that said notice, without any further pleadings, is not sufficient. Such a mode of procedure as this construction requires is more consistent with our form of practice and the general policy of the law as regards actions.

If a case occurs, as referred to in 18 *Georgia, supra*, page 255, where there is no agent of the road in the county, then, if the petition so state, the process may be directed to the proper officer of the county wherein the nearest agent has his

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office, and served on him as contemplated in section 3049. There is nothing contrary to law in this: See *Dunn et al. vs. Dyson*, 22 Georgia, 572; *Dickinson vs. Allison*, *Ibid.*, 557. The right to perfect service in this way is given by section 3049, as we construe it in connection with the other two sections referred to.

In the *Macon and Western Railroad vs. Baber*, 42 Georgia, 300, both the notice and a regular petition and process were served, as will appear from the record in the case, though it is not so distinctly stated in the report. No point was made in that case as to the necessity for such notice. The question made and passed upon was merely as to the sufficiency of the proof of service of the notice. It was held that it was proved. In 28 Georgia, 317, it does not appear that there was any notice except by ordinary petition, process and service by the sheriff.

The construction we here give to the Code on this subject merely requires in such cases the same official notice to be given of suits in the superior courts against railroads which is given to all other parties. We sustain the judgment of the court in dismissing the case, but upon a different ground than the one on which the judgment was put.

Judgment affirmed.

WILLIAM M. SMITH *et al.*, plaintiffs in error, vs. CHARLES R. PATE *et al.*, defendants in error.

1. A B died since the act of 1866, leaving as his heirs-at-law five daughters, all of whom were married, and also leaving a widow. Three of the daughters and their husbands, as complainants, filed a bill against another daughter and her husband, seeking to set aside as fraudulent a deed made by the deceased to the defendants during his life, giving to them certain lots of land. The bill did not make the widow or the other daughters parties. The jury found for the complainants, and decreed that the land should be sold, the proceeds be applied to the support of the widow for life, and at her death be distributed among the heirs-at-law of the deceased father:

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Held, that the verdict was illegal. The husbands of the daughters, the complainants, had no interest in the land, and if the deed was set aside, the rights of the widow and the heirs was fixed by law, and not in issue before the jury.

2. There ought to be a new trial.

Husband and wife. Equity. Parties. Decree. Before Judge KNIGHT. Milton Superior Court. August Term, 1873.

Charles R. Pate and his wife, Emily Pate, Simeon Frazer and his wife, Frazer, and George W. Chambers and his wife, Mary Chambers, filed their bill against William M. Smith and his wife, Eleanor Smith, making substantially the following case :

Complainants, Emily Pate, Mrs. Frazer and Mary Chambers are the daughters and heirs-at-law of Archibald Bradford, deceased. His widow, Margaret Bradford, and his daughters, Martha Ragsdale and Eleanor Smith, are also heirs-at-law of said deceased, but have refused to be made parties complainants to this bill for some reason unknown to complainants.

Archibald Bradford was eighty-five or ninety years of age, and so imbecile in mind and weak and feeble in body as to be wholly incapacitated from contracting. Whilst in this condition, in the year 1869, the defendants, pretending great love and affection for the old man, with a view to possessing themselves of all of his property and of defrauding complainants, induced the old man to believe that complainants were his enemies. Thus operating upon his imbecile mind, and prejudicing him against the complainants, they importuned him to come and live with them under the false promise to take care of and support him. By the means aforesaid the defendants induced the old man to come and live with them. Having thus obtained control of him, by the same false and fraudulent pretenses, they induced him to convey to the defendants, for and in consideration of the natural love and affection which he bore to them, and for the sum of \$5 00, three lots of land in the county of Milton, which was all the property he then owned. This deed was executed on March 21st,

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1870. Soon thereafter said Bradford became sick, and died in the following June. Complainants were fraudulently kept in ignorance of his critical condition, and were thus deprived of the melancholy satisfaction of waiting upon the old man in his last illness.

Complainants waive discovery from each of the defendants, and pray that the deed aforesaid may be decreed to be delivered up to be canceled; that the land may be equally divided between the heirs-at-law of said Archibald Bradford, deceased, or that it be sold and the proceeds divided; and that the writ of subpœna may issue.

The defendants answered, substantially, as follows:

They positively deny that either by themselves, or through others, they ever persuaded or influenced the said Archibald Bradford to make or execute a deed to them for the said lots of land. They deny using any unfair or fraudulent means to induce said A. Bradford to make the deed. Defendants say that said Bradford, in the exercise of his own judgment, so far as they know or believe, made the proposition to defendant, that on account of his age, poverty and extreme destitution, he had decided to leave his home and go and live with some of his children. Defendants suggested to him and advised him to go and live with Charles Pate, or Simeon Frazer, or J. S. Ragsdale, all of whom were his sons-in-law, and said Bradford assured these defendants that he could not live with either the said Pate, Frazer or Ragsdale. Defendants then told him if it were his wish and desire to live with them, they would do the best they could for him, but leaving it at all times to his own free will. He came to their house to live some time about 25th December, 1869, and of his own free will proposed to make them a deed to his land, in consideration that defendants would support and maintain said Bradford and his wife for their natural lives, and satisfy an execution against said Bradford for \$100 00, with seven years' interest thereon. They told said Bradford they would accept his proposition. On the 21st day of March, 1870, said Bradford did execute and deliver to these defendants his deed for

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said tract of land. They did not influence him in anywise to come and live with them, or to make the deed. He was in the possession of his mental faculties and good judgment, both at the time he executed the deed to these defendants and at the time of his death. Defendants took good care of the old man and his wife until his death, and have since taken care of the old lady, who is now blind and helpless. They intend to do so, so long as she may live. These defendants having fully answered, pray to be relieved, etc.

The jury returned the following verdict : " We, the jury, find and decree that the deed from Archibald Bradford to William Smith and Eleanor Smith, to lots of land numbers nine hundred and ninety-four, nine hundred and ninety-five, and one thousand and twenty-four, in the second district and second section of said county, mentioned in said bill, be delivered up, canceled, set aside and annulled, and then said land be sold and a reasonable support be furnished to Margaret Bradford, widow of the deceased, out of the proceeds of said sale (or out of the rent of the same) during her lifetime, and at her death the remainder of the proceeds of the sale and the rent of said land, be equally divided between the legal distributees of Archibald Bradford, after the payment of \$100⁰⁰, principal, with interest, due by Archibald Bradford to William Smith."

A motion for a new trial was made upon the ground, amongst others, that the aforesaid decretal verdict was contrary to law and equity. The motion was overruled, and the defendants excepted.

IRWIN, ANDERSON & IRWIN, for plaintiffs in error.

No appearance for defendants.

MCCAY, Judge.

1. We should hesitate to interfere with this verdict on the ground that there is no evidence to justify setting aside the deed. It may be there is strong evidence in favor of its integrity, but there is certainly some evidence to show that it

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was unduly obtained. But we think the verdict as it stands is illegal. Under the act of 1866 the husbands of these ladies had no interest in this land, and a verdict for the complainants generally is a verdict in favor of the husbands and wives jointly. Again, if the deed be set aside the land belongs to the estate of the old gentleman. It is to be administered on, or go to the heirs-at-law according to the circumstances. The rights of the widow are fixed by law. She takes a child's part or her dower, at her option. What was there in the evidence or the case to justify the application of the proceeds to the widow during her life? She was no party to the proceedings and may not desire to have her rights so disposed of. The same may be said of the other daughters who were not parties to the bill, as well as of Mrs. Smith. There was no prayer in the bill, or any call in the proof for this administration and division of the land, nor were there proper parties before the court to justify it.

2. The jury seem to have set aside the deed under an impression that they could give a better course to the title to these lands than either the deed or the law, and this may be true in this case, but it is not permitted by law. The verdict should have been for the deed or against it, leaving the widow as well as the others to their rights. We are not satisfied that the jury would have set aside the deed except on the terms stated, and we think there ought to be a new trial.

Judgment reversed.

**EDWARD EADY, plaintiff in error, vs. CLARRISSA WINGATE,
defendant in error.**

To charge upon a point not warranted by the evidence is error.

New trial. Charge of Court. Before Judge STROZER.
Worth Superior Court. November Term, 1873.

For the facts of this case, see the decision.

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W. A. HARRIS; WARREN & ELY, by brief, for plaintiff in error.

SMITH & JONES, for defendant.

WARNER, Chief Justice.

The plaintiff brought an action against the defendant on an open account for the sum of \$260 15. The defendant filed a plea of set-off for the sum of \$96 34, and also a plea of recoupment, in which she alleged the plaintiff had damaged her \$200 00 in consequence of his neglect and failure to properly cultivate her farm and gather the crop thereon during the year 1870. On the trial of the case the jury, after hearing the evidence for both parties and the charge of the court, returned a verdict in favor of the defendant for the sum of \$6 55. A motion was made for a new trial on the grounds that the verdict was contrary to the weight of the evidence, and for error in the charge of the court, which motion was refused on condition that the defendant would write off from her verdict the said sum of \$6 55. Whereupon, the plaintiff excepted. The court charged the jury "that if there was a contract between plaintiff and defendant by which the plaintiff was to use the horses of defendant for a particular purpose, then he had no right to use them for any other purpose, and that if he did, he was liable to pay for the use of them." One of the questions in dispute between the parties, was whether the plaintiff was liable to pay the defendant for the use of her horses the amount charged by her therefor.

In looking through the record we fail to discover any evidence of any *contract* between the parties in relation to the use of the defendant's horses by the plaintiff for any purpose. This charge of the court having been made on an assumed state of facts not authorized by the evidence, was error, and we reverse the judgment on that ground, which we do the more readily because we are not satisfied that the verdict was right under the evidence in the case.

Let the judgment of the court below be reversed.

White *vs.* The State of Georgia.

JOHN P. WHITE, plaintiff in error, *vs.* THE STATE OF GEORGIA *et al.*, for use, etc., defendants in error.

1. A tax collector who has settled his tax digest with the state and county, may use the executions he has issued against delinquent taxpayers to reimburse himself by collecting from them their unpaid taxes, but he is not entitled to the immunity from judicial interference which the law provides for the state, and he can only collect such tax as is legally due.
2. One who comes into this state after the first day of April of any year, and has no property here before or at the time, is not liable to pay tax to the state or county for that year.
3. If one has duly given in all his taxable property to the tax receiver at its proper value, and the tax collector assess a double tax against him for other property which the tax-payer does not in fact have, such double tax is illegal.

Taxes. Judicial interference. Execution. Before Judge STROZER. Dougherty Superior Court. April Adjourned Term, 1873.

Two tax executions for the use of R. T. Gilbert, tax collector, for the years 1868 and 1869 respectively, the first being for \$71 20, and the second for \$63 40, against John P. White, were levied upon certain property as belonging to defendant. An affidavit of illegality was filed on the grounds that defendant was not a citizen of the state of Georgia on April 1st, 1868, and that he made return for the year 1869 of all the property he then owned. The evidence upon the issue thus formed presented the following facts :

The defendant moved from the state of Louisiana to the county of Dougherty on May 15th, 1868. He then had about \$8,000 00 in notes and money. Meeting the tax collector on the street, he told him that he must return his property for taxation, which he accordingly did. Subsequently ascertaining that, under the circumstances aforesaid, his property was not liable to taxation for the year 1868, he refused to pay. He used his notes and money for the purchase of a plantation, which he still owns. For the year 1869, he returned said plantation and paid the tax due there-

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on. He gave in no notes and money, as he then had none. He was taxed as a defaulter for said last year because he failed to return said \$8,000 00 in notes and cash, which he had on hand when the return for the previous year was made. The tax collector had settled with the state and county for the year 1868, and had paid over the amount now sought to be collected from White for that year. He had settled with the county also for the tax of the year 1869.

The defendant requested the court to charge the jury as follows :

1st. "That a citizen is not liable to taxation for the year who comes into the state and county after the 15th day of May of that year, and if the jury believe White did not come into the county and state until then, he was not liable to tax in 1868."

2d. "That if the jury believe that the two *fi. fas.* have been paid by Gilbert, the tax collector, to the state of Georgia, they are proceeding illegally *pro tanto*, *i. e.*, as to the amount due the state, and cannot be enforced, there being no transfer to him. That if the tax to the county has been paid by Gilbert, then he could not make use of the *fi. fa.* in this way to collect what was pretended was county tax."

The court refused so to charge, and defendant excepted.

The court charged as follows :

"Parties cannot stop a tax *fi. fa.* except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, and not even in those cases without special circumstances showing that the collection of the tax would be likely to produce irreparable injury, or cause a multiplicity of suits."

To which the defendant excepted.

The jury found for the plaintiffs with twenty-five per cent. damages. Error is assigned upon each of the above grounds of exception.

HINES & HOBBS, for plaintiff in error.

VASON & DAVIS, for defendants.

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McCAY, Judge.

1. The immunity from judicial interference allowed by the Code, section 3668, is a high prerogative, granted alone to the state, and in my judgment of very doubtful constitutionality at best. But there is nothing in that section extending it to cases of private individuals when there is no pretense of anything due the state. The ground upon which the constitutionality of this act is defended, is that the state must not be delayed in its collections, and that if any money is unjustly paid, the legislature will do right by the party paying it. But when the tax collector has settled with the state, the state necessity for this essentially tyrannical exemption ceases, and though the tax collector may use the process it has lost its invincibility with the necessity which made it defensible. We are strongly inclined to the opinion that the legislature could not grant the right insisted on, if in plain terms it were to attempt it. The constitution gives to every citizen the right of appeal to the courts, and though the state itself may not in all cases be brought to the bar, we are, as we have said, strongly inclined to say, that it cannot confer by any indirection this exemption upon others.

2. Was this tax legal? Clearly under the settled rule in this state the day fixed to determine what and who is taxable for the current year is the first of April. That is the express provision of the Code, section 834. This tax was therefore illegal, as the defendant in error was not on the first of April a resident of the county nor even of the state.

3. So, too, we think the next year's tax—double tax—illegal. The proof is that the legal tax for that year was given in and duly paid. Why should there be any assumption that because a tax payer has cash on hand one year that he has it also the next. It is but natural that he should invest it, as the proof shows was done in this case, and the tax on the investment duly paid.

Judgment reversed.

Parrott *vs.* Wilson.

M. M. PARROTT, executrix, plaintiff in error, *vs.* Z. F. WILSON, defendant in error.

1. Where a defendant in a criminal case gave a promissory note to the solicitor general for the fine imposed on him, and was afterwards pardoned by the governor and the fine remitted, and the same was unappropriated in the manner prescribed by law, such pardon and remission of the fine discharged the defendant from the payment of the note, even if it had been sued and judgment obtained upon it before the fine was remitted.
2. The testimony of the sheriff, which was objected to, was admissible for the purpose of showing that the note on which the judgment was rendered was the one taken for the fine; and we cannot say that the judge, to whom the whole question was submitted, was not authorized to hold that the identity was proven.

Criminal law. Fine. Pardon. Promissory notes. Judgment. Before Judge UNDERWOOD. Gordon Superior Court. August Term, 1873.

An execution in favor of Josiah R. Parrott against Z. T. Wilson, based on a judgment rendered in Gordon superior court on April 8th, 1867, for \$262 55, principal, with interest and costs, was levied on certain land as the property of the defendant. An affidavit of illegality was interposed on the ground that the execution had been "paid and settled in full." The issue thus formed was submitted to the court without the intervention of a jury. The following facts appeared:

At the April term, 1866, of Gordon superior court, the defendant was convicted of the offense of adultery and fornication, and sentenced to pay a fine of \$250 00 and the costs. By consent of the court he was allowed to give a note to the solicitor general, Josiah R. Parrott, in settlement of the penalty. The evidence points to this note as being the basis of the aforesaid judgment. This fine had never been disbursed by order of court. On August 1st, 1867, the defendant was pardoned by the governor and the fine remitted.

Upon the trial the sheriff of the county, at the time the defendant was convicted, was introduced to show the consent of the court to the aforesaid settlement, and to prove facts

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tending to establish the identity of the note then given with that upon which the aforesaid judgment was rendered.

This evidence was objected to by the plaintiff. The court nevertheless admitted it, and the plaintiff excepted.

The court sustained the illegality, and plaintiff excepted.

Josiah R. Parrott having died pending the litigation, his executrix, M. M. Parrott, was made a party in his stead.

Error is assigned upon each of the aforesaid grounds of exception.

W. H. DABNEY, for plaintiff in error.

J. A. W. JOHNSON ; R. J. McCAMY, for defendant.

TRIPPE, Judge.

1. It was held in *1 Kelly, 606, in the matter of J. J. R. Flournoy, attorney general*, that so far as the public is interested in a fine imposed, the executive remission has the effect to restore it to the individual fined, although it had been paid over to the attorney or solicitor general, and by him to the county treasurer, before the executive pardon was granted ; and that a fine thus remitted being in the hands of the attorney general or other officer of court, unappropriated in the manner prescribed by law, will be refunded under an order of court, by rule against such officer. We think that decision governs this case. It is true the ex-sheriff states that there were some insolvent costs due him when the fine was imposed and the note given. But he does not state how much, or that any order was granted appropriating the money to be raised from this fine to the payment of such costs, or for any other purpose. If the mere fact that a county owed insolvent costs would prevent an executive pardon from having effect after the money was in the hands of the solicitor general, or a note given therefor, there could hardly be a case in which a pardon granted after either of those acts had happened, would be of any avail, at least towards the remission of the fine. Had the money been collected and appropriated as the law directs, the

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question would be different—vested rights would have intervened; so if one-half or other portion of the fine was by law to go to an informer: 2 Bay, 565; 1 Nott & McCord, 26. But, as remarked in the case from 1 *Kelly*, "the money raised by the sentence, or rather its equivalent, the promissory note received by the attorney general in lieu of the money, had never passed from his hands. He is an officer of the court. The fund was therefore within reach of the court. It could lay its hands upon it and return it to the defendant. It had in this summary way the right to determine the questions made by the record." That was a case upon a rule against the attorney general to return the note, or rather to credit it, as two defendants had been fined, a joint note given, and one of them had been pardoned. Here the question arises on an illegality to an execution sued out by the solicitor general on the note before the pardon issued. In both cases the matter was equally within the power of the court.

2. The testimony of the sheriff, which was objected to, was competent for the purpose of proving that the note on which the judgment was founded was the note taken for the fine. We cannot say that the judge, to whom the whole question was submitted, was not authorized from the evidence to decide that the identity was sufficiently proven. It was a matter of fact to be determined by a jury, and the judge was substituted for the jury.

Judgment affirmed.

DAVID SHARPE *et al.*, plaintiffs in error, vs. WRIGHT KENNEDY *et al.*, defendants in error.

When a bill is filed praying an injunction against the enforcement of a judgment at law, and the judge, after a hearing on a rule to show cause why a temporary injunction until a final hearing should not be granted, refuses the injunction, this court will not interfere to control his discretion unless there be an error of law, or unless the right of the complainant is, under the facts, plain and manifest.

Sharpe et al. vs. Kennedy et al.

Injunction. Before Judge KIDDOO. Terrell county. At Chambers. December 29th, 1873.

David Sharpe and Farnham & Sharpe, composed of William W. Farnham and James P. Sharpe, filed their bill against Wright Kennedy and Charles C. Brown, sheriff, upon the following state of facts:

On the 27th day of January, 1871, complainants became security for Leroy Brown on a promissory note, of which the following is a copy:

“\$800 00. On or before the 15th day of November next, we promise to pay Wright Kennedy, or bearer, eight hundred dollars, for value received, January 27th, 1871.

(Signed)

“ LEROY BROWN,

“ DAVID SHARPE, sec'y,

“ FARNHAM & SHARPE.

“ Interest at two per cent. a month.”

The memorandum at the foot of the note was put there by the principal and payee of said note after complainants had signed the same and left the room, without their knowledge or consent, and is and was no part of their contract of suretyship. Cotemporaneously with the signing of said note the principal, Leroy Brown, in order further to secure the note and to indemnify the securities thereon, executed a deed conveying to Kennedy in fee simple, several lots in the town of Dawson, three of which were known as the “hotel lots.” The note was not paid at maturity, and was sued to judgment at the November term, 1872, of Terrell superior court, upon which a *fi. fa.* was issued against Brown and Farnham & Sharpe, as joint principals, returnable to the May term, 1873. The fact that complainants were only securities was well known to Kennedy, both when the note was signed and when judgment was taken. The deed given to the payee was ample security, and he knew that complainants relied upon said deed to indemnify them against the principal, for although they knew that the legal

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title to the "hotel lots" was not in Brown, and never had been, the other property conveyed in said deed was more than enough to pay off the note even upon a forced sale. Before any levy was made under said *fi. fa.*, and in order to protect themselves and save further delay, complainants, through the agency of James P. Sharpe, on or about the 7th day of April, 1873, tendered to Wright Kennedy and his attorney, F. M. Harper, Esq., in the office of said Harper, in Dawson, the full amount of principal, interest and costs due on said *fi. fa.*, and at the same time demanded a transfer of the judgment, and also demanded the other security in his hands, by giving them a deed to the property which their principal had conveyed to Kennedy to secure the payment of said debt. Leroy Brown was present, and consented for this deed to be made, and it was fully "within the power" of said Kennedy to have made the deed as demanded.

The tender was in good and lawful money of the United States, and was enough to pay off the entire debt. No objection was made to the kind of money, the mode of tender, or its sufficiency, but Kennedy and his attorney, F. M. Harper, Esq., refused to take the money, saying to James P. Sharpe, "You need not count the money; it will not be accepted unless you pay the full amount of interest we claim," or words to that effect, placing their refusal upon the sole ground that Kennedy was entitled to more interest than the judgment called for, viz: interest at the rate of two per cent. per month, as expressed in the memorandum on the note. On the same day, Kennedy, in bad faith toward complainants, executed a deed conveying the whole of the property held as security back to Brown, in which deed there was no reservation whatever, and no recital that it was made for a particular purpose. The property thus re-conveyed was then levied on as the property of Leroy Brown, and at the same time two other lots of land in Terrell county were levied on as the property of James P. Sharpe. As soon as this last deed was made, and before the property could be sold by the sheriff, the wife of Leroy Brown applied for and obtained a "home-

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stead" in all the land to which her husband held a good title, and had "exempted" all his personal property, and thus defeated the collection of said judgment out of the principal. Between the execution of the deed from Brown to Kennedy and the re-conveyance back to Brown, other judgments were obtained against him older than that of Kennedy *vs.* Brown and complainants, which, in a contest between judgments, might have taken the money to the manifest injury of the securities. Leroy Brown has become utterly insolvent, and been adjudged a bankrupt within the past four months. F. M. Harper, Esq., attorney for Wright Kennedy, is also attorney for Leroy Brown in the matter of his bankruptcy. Kennedy is now proceeding against the property of complainant Sharpe alone, and has caused to be advertised for sale by the sheriff of Terrell county, on the first Tuesday in January, 1874, two lots of land belonging to him. The bill prays an injunction against Wright Kennedy and Charles C. Brown, sheriff, restraining them from selling the land of James P. Sharpe, and restraining all other proceedings under said *fit. fa.* until the further order of the court.

The defendant, Wright Kennedy, filed his answer, in substance, as follows: Admits the loan of the money as set out in the bill, but said he knew nothing of Farnham & Sharpe being only securities on said note. Set up that W. W. Farnham was the officious man in procuring the loan; that it was his confidence in Farnham & Sharpe that induced him to part with his money, and that Farnham & Sharpe used the money and got the benefit of it. Did not know whether the memorandum on the note was put there before or after the signing of the same, but did know that Mr. Farnham got the money and agreed to give respondent that rate of interest. Admits taking the deed from Brown, and says that he gave Brown a "bond for titles" to re-convey the property on payment of the note with interest. Admits the suing of the note to judgment, and charges that no defense was made because Kennedy, through his attorney, promised complainant Farnham not to take judgment for more than lawful interest.

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Admits that the *fi. fa.* was issued and levied as set out in the bill. Knew nothing of the value of the property conveyed to him by Brown, nor of the genuineness of Brown's title, but charges that Farnham, as an inducement for them to make the loan, told him that Brown's title was good, and that the property was worth far more than the amount of the note with interest. Knew nothing of complainants' relying on the deed to indemnify them, but charges the contrary, as Farnham claimed the most valuable piece of said property as his own. Admits that before any levy was made, Mr. Sharpe met him at the office of F. M. Harper, Esq., for the purpose of settling this debt. Says that he agreed to make the transfer of the judgment as demanded by said Sharpe, but that Sharpe also demanded a warrantee deed to the property he held as security, which respondent refused to give, having learned that there were executions against Brown prior to the date of the deed from Brown to respondent. Respondent offered to give a "quit claim" deed to the sureties, provided his bond for titles was given up, and Brown would consent. Denied that any tender was made to him by James P. Sharpe. He saw no money, and none was offered to him or his attorney, but Sharpe refused to pay except upon conditions, with which, as he was advised and believed, he could not comply. He further says that he told Sharpe he was willing to accept the \$800 00, with interest from the date of the note, at seven per cent., but that Sharpe refused to agree to that, and left the office. Admitted making the deed back to Brown, but says it was not done in bad faith, but for the purpose of having the property levied on and sold to satisfy the *fi. fa.* On the 8th day of April said property was levied on and advertised for sale on the first Tuesday in May, 1873, and at the same time the same *fi. fa.* was levied on two lots of land belonging to James P. Sharpe. On the day of the sale a claim was interposed by W. W. Farnham to one-half interest in the "hotel lots" in the town of Dawson, which prevented said property from selling, the balance of Brown's property having been set aside as a home-

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stead for his wife, long before the deed from respondent re-conveying the property to him. Sharpe interposed an affidavit of illegality to the sale of his property, and thus stayed proceedings on said *f. fa.* until the May term, 1873, of the superior court, when it was dismissed. Pleads the judgment of the superior court of Terrell county upon the affidavit of illegality and the judgment of this court affirming it, in bar of this bill, upon the ground that the questions made are *res adjudicata*. Admits that Brown has filed his petition in bankruptcy, and that he, defendant, is trying to collect the money due on said *f. fa.* out of complainant Sharpe, and that the property of Sharpe is advertised as set out in the bill.

Several affidavits were read in support of the bill and one in support of the answer. They are omitted as the case is sufficiently presented by the bill and answer.

The injunction was refused, and complainants excepted.

IRWIN & GRESHAM; HOYLE & SIMMONS, for plaintiffs in error.

F. M. HARPER, by RICHARD H. CLARKE, for defendants.

McCAY, Judge.

We are not prepared to say that there is not equity in the facts set forth in this bill. Under section 2155 of the Code, if the surety tender to the creditor the amount due, and demand the evidences of the debt and any securities the creditor may have, to be delivered to him, and the creditor fail to comply when within his power, this will operate to discharge the security. The language of the law is plain and positive.

As to control and possession of the *f. fa.*, that goes to the security by operation of law on the payment, and if placed by the creditor in the hands of the sheriff, we do not think a transfer would be necessary. But it was, as we think, the duty of the creditor to pass the title of these lands to the security, Brown consenting; and did the case stand on the

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charges in the bill alone we should feel compelled to reverse the judgment.

But the answer contradicts several of the material charges in the bill. It replies that the security demanded a warranty deed. He had no right to that. The answer also denies the tender, and this is supported by Harper's affidavit. Now we do not say that the money must have been counted out and offered by an outstretched hand to the creditor. But by the answer and by Harper's affidavit, there was no money offered; there was a proposition to pay on certain terms. A proposition to pay and a tender, are by no means the same thing. The former may exist without any element of the latter.

We do not feel that the evidence of a tender is sufficiently strong to justify us in reversing the judgment. It is the settled rule, that on questions of fact the evidence must be strongly against the judgment of the judge to authorize this court to reverse his judgment in injunction cases. We do not think the dismissal of the affidavit of illegality is a bar to a proceeding in equity, though it may be one of the facts which may operate on the mind of the judge to control his discretion in refusing the injunction. The putting in of so meagre and inconclusive an affidavit when the facts were as well known then as now, may have been a mere pretext for delay, and taken in connection with the conflict of the evidence, may have tended to incline the judge in favor of the plaintiff in *fa. fa.* We do not think the want of knowledge on the part of Kennedy at the time the money was loaned, as to who was the principal, was material. He had the notice at the time of the alleged tender, and he acted in this respect at his peril.

We simply refuse to reverse the judgment denying the injunction. If the facts are with the plaintiff he can so satisfy a jury, and if he has paid the money, or it has been collected out of him, the jury can decree its return. There is no allegation of Kennedy's insolvency, and the only harm that can happen is the use of the money, and *prima facie*, Kennedy is entitled to that by the judgment.

It may, however, be well enough to say that if it should

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appear that this deed was at the time worthless—that is, if the property was as defendant says—all disposed of by a good homestead before this alleged tender was made, we do not decide that even a tender and refusal to make the deed would release the security. The deed and bond were in fact only a mortgage, and if that was at the time wholly inoperative by reason of the homestead, we incline to the opinion that the presumption of harm, or the chance that he might be harmed by the refusal, would be rebutted, and that the case in 37 *Georgia*, referred to in the argument, would be inapplicable. We would also say, in conclusion, that if, as defendant's answer shows, he was defrauded and misled by the complainants into accepting a deed from Brown to property that belonged to them, they do not come into a court of equity with much grace, and that Kennedy may give them a good deal of trouble by a levy on that property even if they be released as securities.

On the whole, we feel constrained to affirm the judgment denying the injunction.

Judgment affirmed.

JOSEPH H. ALLEN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Under the constitution of 1868 the general assembly has authority to provide for the trial of misdemeanors in county courts and other inferior tribunals, by juries composed of a less number than twelve jurors.
2. Where the written accusation fails to charge the defendant with being a vagrant, because he was a professional gambler living in idleness, it was error to allow testimony showing such fact.
3. Where a trial was had in the county court, and the writ of *certiorari* sued out thereto, the hearing upon which was had before the judge of the superior court at chambers, the bill of exceptions to his judgment need not be served upon the solicitor general of the circuit. Service upon the solicitor of the county court is sufficient. (See report. R.)

Constitutional law. Jury. Evidence. Criminal law. Practice in the Supreme Court. Before Judge STROZER. Dougherty County. At Chambers. July 16th, 1873.

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When this case was called a motion was made to dismiss the writ of error because the bill of exceptions had never been served upon the solicitor general of the Albany circuit. The papers disclosed that the trial had been had in the county court, and the writ of *certiorari* sued out thereto. The hearing upon the *certiorari* was had before the judge of the superior court, at chambers, and it is to his judgment that the bill of exceptions was filed. Service was made upon the solicitor of the county court. The motion was overruled, the court enunciating the principle embraced in the third head-note.

For the facts, see the decision.

HENRY MORGAN, for plaintiff in error.

B. B. BOWER, solicitor general, by R. F. LYON, for the state.

WARNER, Chief Justice.

The defendant was tried in the county court of Dougherty county on a written accusation, for vagrancy, as provided by the 31st section of the act of 1872 establishing that court, and the amendatory act thereof of 1873, and found guilty. The defendant sued out a writ of *certiorari* to the superior court, alleging that errors were committed in the county court on the trial of the case. After hearing and considering the alleged errors contained in the *certiorari*, the court overruled the same, and the plaintiff in *certiorari* excepted.

1. One of the errors complained of is that the defendant, on his trial in the county court, was entitled to have been tried by a jury of twelve men instead of a jury of five men as provided by the 31st section of the act of 1872, and the 3d section of the amendatory act of 1873. The constitution of 1868 does not declare that the right of trial by jury, as *heretofore used* in this state, shall remain inviolate, but the constitution of 1868 declares that the right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate, and that the general assembly shall provide by law for the selection of upright and intelligent persons to

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serve as jurors. The words "except where it is otherwise provided in this constitution," doubtless has reference to that clause which authorizes the superior court to render judgment without the verdict of a jury in civil cases where no issuable plea is filed, and not to the number of persons who should compose the jury. If the words "trial by jury as heretofore used in this state," were in the constitution of 1868 there would have been some ground for supposing that a common law jury of twelve men as heretofore used in this state was intended, and no other. But the words "as heretofore used in this state" are omitted in the constitution of 1868, and by that same constitution it is declared that a jury of seven shall be a lawful jury in the district court which was authorized to be organized by it. The right of trial by jury is one thing, the number of persons who shall compose the jury is another. The fact that the constitution of 1868 recognizes seven persons as a lawful jury in the district court clearly demonstrates that it was not intended that there should be a jury of twelve men in all cases. The general assembly, in establishing the county court of Dougherty county, have provided that on the trial of accusations in that court, when demanded by the accused, the judge thereof shall have summoned by the sheriff a jury of twelve men, who are subject to jury duty in the superior court, from which the defendant and the state shall alternately strike, until but five jurors remain, who shall compose the jury. In our judgment, this act and the amendment thereof providing for a jury as therein specified, is not a violation of the constitution of 1868, so far as the same is applicable to trials for misdemeanors in the county courts and other inferior tribunals established by law, but we express no opinion as to the right of trial by a common law jury of twelve men, on an indictment for murder, or in cases of felony, under the constitution of 1868. The complaint is not that the defendant was not tried by a jury of upright and intelligent persons, but the complaint is as to the number of the jurors provided by the act for the trial of the accusation made against him in the county court.

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2. The defendant also excepted to the ruling of the court at the trial, in allowing a witness for the state to testify, over defendant's objection, that he was a professional gambler, there being no allegation in the written accusation to authorize it. The 4560th section of the Code recognizes five distinct classes of vagrants: First, persons wandering or strolling about in idleness, who are able to work, and have no property to support them; second, persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and who do not work; third, persons able to work, having no property to support them, and who have not some visible and known means of a fair, honest and reputable livelihood; fourth, persons having a fixed abode, who have no visible property to support them, and who live by stealing, or by trading in, bartering for, or buying stolen property; fifth, all professional gamblers living in idleness shall be deemed and considered vagrants, and shall be indicted as such. The defendant in this case was not charged in the written accusation in the county court with being a vagrant because he was a professional gambler living in idleness, and therefore it was error in the court in allowing the evidence on the trial to prove that fact, for the reason that the defendant was not notified by the accusation that the state was proceeding against him as a vagrant on that ground, and it cannot be presumed that he was prepared at the trial to meet that charge. If the state desired to convict him as a vagrant under the statute because he was a professional gambler living in idleness, that fact should have been alleged in the written accusation to have authorized the evidence of it at the trial.

Let the judgment of the court below be reversed.

Gardner, Dexter & Company vs. Moore, Trimble & Company.

GARDNER, DEXTER & COMPANY, plaintiffs in error, vs.
MOORE, TRIMBLE & COMPANY, defendants in error.

A mortgage of real estate attested by but one witness is not void, and, if a subsequent mortgagee or purchaser buys or takes his mortgage with actual notice of a prior mortgage, he takes subject to it, even though it have but one witness.

Mortgage. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

This case arose upon a rule against the sheriff of Talbot county, at the instance of Moore, Trimble & Company, requiring him to show cause why he did not pay over to a mortgage execution in their favor, certain funds then in his hands, realized from the sale of the mortgaged property. Amongst other causes, the sheriff set up the fact that he had in his hands an execution based on a mortgage of older date on the same property, in favor of Gardner, Dexter & Company. It was replied that the mortgage of Gardner, Dexter & Company being on real estate was void, having but one witness.

Both mortgages were executed by William Ragland. That to Moore, Trimble & Company recited that the lands therein described were conveyed "with the following reservation and exception, that is to say, saving and excepting the interest previously conveyed by said Ragland to Jane E. Shaw and Gardner, Dexter & Company, by reason of two deeds of mortgage given said Jane E. Shaw to said lots to secure a note for \$500 00, and to said Gardner, Dexter & Company, to secure a note to them of \$526 92."

Jane E. Shaw seems to have taken no part in the contest. The court held the mortgage of Gardner, Dexter & Company to be invalid on account of its having but one witness, and excluded it from participation in the fund according to its priority. To which Gardner, Dexter & Company excepted.

MARION BETHUNE; M. H. BLANDFORD; WILLIS & WILLIS, for plaintiffs in error.

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E. H. WORRILL; J. M. MATTHEWS, for defendants.

McCAY, Judge.

Section 1954 of the Code does say, "It (a mortgage of real estate) must be attested by two witnesses, and it *must be recorded*," etc. But sections 1957 and 1959, part of the same chapter and the work of the same hand, contemplates that a mortgage not duly recorded, "or without *due attestation*," may be good except as against *bona fide* purchasers without notice or subsequent liens not created by contract. And this was undoubtedly the law before the Code. In 17 Georgia, 295, this court held that a deed with but one witness was not void, notwithstanding the acts of 1760 and 1785 had said that all conveyances of land "shall" be by deed, attested by two witnesses. The word conveyance, in the act of 1760, and the word mortgage, in section 1954 of the Code, and perhaps, also, the word deed, in section 2690, Code, are to be taken to mean "a perfect deed," one proper to be recorded, and to be constructive notice to all the world when so recorded. The statute of frauds only requires contracts relating to land to be in writing, and our Code, (Irwin's,) section 1940, makes the same provision. Taking this in connection with the provision as to mortgages and deeds, it seems to us that the latter provisions only mean that a perfect deed—a perfect mortgage—one, the record of which conveys constructive notice, must be attested in a particular way, and be also recorded, etc. The Code is not to be construed as changing the old law, unless the change be very apparent, and it would be specially dangerous to take the definitions of the Code as absolutely accurate, and as excluding the common law definitions, unless it be plainly manifest that the intent was to make an exclusive and inclusive definition.

For these reasons we are constrained to reverse the judgment in this case. Moore, Trimble & Company took their mortgage with positive and detailed notice of the mortgage of the plaintiffs in error. Indeed, it is specially provided in

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the mortgage of Moore, Trimble & Company that the interest they take is to be subservient to the mortgage of the plaintiff, and much might be said against their right now to repudiate that priority of the plaintiff, even if his, the plaintiff's, mortgage were not good as a technical mortgage.

Judgment reversed.

ROBERT JOHNSON, plaintiff in error, vs. FRANK FOX *et al.*, defendants in error.

[McCay, Judge, was providentially prevented from presiding in this case.]

1. A ministerial officer is protected in the execution of a process from a court of competent jurisdiction, where there is nothing on the face of the process or attached thereto, showing that it is illegal or void, or that it has been superseded.
2. In an action against an officer for levying and selling under such a process, if the plaintiff rely on the fact that it has been superseded, he should not only so state in the declaration but should also charge notice of that fact on the officer.
3. Where on a trial in a justice court of the issue made by counter-affidavits against lien executions in favor of laborers, judgments are rendered for plaintiff, and an appeal is entered or a *certiorari* sued out, the justice has no authority to grant an order that the executions proceed for the purpose of raising money to pay the cost.
4. But as it does not appear from the record whether the sale in this case was had under an order to proceed with the original execution or under a special order directing a sale, and that the proceeds be applied to the payment of cost, the judgment sustaining the demurrer is affirmed.

Officers. Process. Laborer's lien. Appeal. *Certiorari.*
Before Judge CHISOLM. City Court of Savannah. July Term, 1873.

This case is reported in the opinion.

A. P. ADAMS; HENRY B. TOMPKINS, for plaintiff in error.

RUFUS E. LESTER, for defendants.

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TRIPPE, Judge.

1. The general rule is that a ministerial officer is protected in the execution of process from a court of competent jurisdiction, when there is nothing on the face of the process showing that it is illegal or void, or that it has been superseded: 7 Porter, 67; 5 Hilliard, 440; 7 Metcalf, 257; 1 Iredell, 473.

2. The declaration in this case alleges that the sale by the officer was made under an execution, when there had been a *certiorari* sued out on the judgment on which the process issued. This was the execution in favor of Robert Williams *vs.* Johnson, the plaintiff in error. There was no allegation that the levy of the other execution in favor of John Jivilin, from whose judgment an appeal had been entered, was prosecuted to a sale of the property, nor that the order of the justice covered said execution. Nor is there any allegation that either the justice or the constable knew that the *certiorari* had been sanctioned. It might well be, and doubtless often is, that a *certiorari* is granted, and no notice thereof given to the other party, nor the fact known to any officer for a considerable time. By sections 4058 and 4059, Code, service is required to be made of the writ on the party to whom it is directed (the justice in this case,) fifteen days, and notice thereof to the opposite party ten days, before the sitting of the court to which the same may be returnable. This may be sixty or ninety days, or more, after the writ is ordered; and as in this case it seems the cost was not paid, the affidavit in *forma pauperis* must have been made, and consequently no notice of even an intention to apply for the writ, or that there was any such writ given, unless it was given under the statute. As stated, this is not alleged. Of course there could have been no appeal without notice to the justice. But as before remarked, the allegation is that the sale was made under the execution of Williams, in whose case there was no appeal.

3. If a plaintiff in an action against the officer for levying and selling under such a process, rely on the fact that it has been superseded, he should not only so state in his petition,

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but should also charge notice of that fact on the officer : See *Whitfield vs. Johnson*, 1 Iredell, 473. It is true that where an appeal is thus entered, or a *certiorari* sanctioned and so known to the justice, he has no authority to grant an order that the execution proceed for the purpose of raising the money to pay the cost. And it may further be said, that it must be a peculiar case where the justice can issue any order merely for the collection of cost, unless it be one where only judgment for cost is given.

4. But we do not take it from the declaration that such an order was issued. It certainly is not distinctly so stated. It is charged that the object of the constable was to collect the cost, and that such intention was known to the justice. This he had a right to do, if he proceeded at all—a right to collect both principal and interest of the debt and cost. I will further add that it is nowhere stated what disposition was made of the proceeds of the sale. The statement that the order was granted under the act of 21st February, 1873, shows that it could not have been granted merely for the purpose of raising money to pay the cost. We take the case simply to be this, that a lien execution for an amount under \$50 00 was in the hands of the constable, and was levied ; that a counter-affidavit was filed by the defendant. On the hearing of the issue formed on this, the judgment was in favor of the plaintiff. The defendant applied for and obtained a writ of *certiorari* without the payment of costs, or giving bond and security. That no notice of this writ was given to the justice or the constable, at least none is alleged, and that within three or four days thereafter the justice ordered the execution to proceed under the act of February, 1873, and that the constable sold the property levied on by virtue of the execution and the levy already made. We say, these are the facts we gather from the declaration and the amendment. The intention of the officer to have the cost paid, as stated in the amendment, does not make that illegal which was otherwise legal. This being so, the dismissal of the suit on demurrer is not error.

Judgment affirmed.

Kemp et al. vs. Lowe.

MORGAN KEMP et al., plaintiffs in error, vs. JAMES M. LOWE, ordinary, for use, etc., defendant in error.

Where the sole exception is to the decision of the Court sustaining a demurrer to a plea, and neither the record nor bill of exceptions sets forth said plea, the judgment will be affirmed.

Practice in the Supreme Court. Bill of exceptions. Before Judge JAMES JOHNSON. Marion Superior Court. October Term, 1873.

For the facts of this case, see the decision.

B. B. HINTON; M. H. BLANDFORD, by JAMES M. RUSSELL, for plaintiffs in error.

HENRY L. BENNING, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants on a guardian's bond. It appears from the record, by the sheriff's return, that one of the defendants was not to be found, and the plaintiffs discontinued their suit as to that defendant, and thereupon the defendants, as the bill of exceptions states, filed their plea in abatement, which is of file and of record in said court, and that the plaintiffs demurred to the same, which demurrer was sustained by the court, and the defendants excepted. There is no plea in abatement contained in the record or attached to or set forth in the bill of exceptions. What facts were alleged therein we do not know, and have no means of ascertaining, except by the general statement of counsel who argued the case, we consequently cannot determine whether the court erred in sustaining the demurrer to the plea or not.

Let the judgment of the court below be affirmed.

Mitchell *vs.* Butt *et al.*

ISAAC G. MITCHELL, plaintiff in error, *vs.* REBECCA B. BUTT *et al.*, defendants in error.

Where a note was given in November, 1862, for Confederate money borrowed, payable two years after date, and the jury, in adjusting the equities between the parties according to the ordinance of 1865, gave a verdict rating the value of Confederate money neither at the date of the note nor at its maturity, but at a date intermediate between the making and the maturity of the same:

Held, that while the verdict does not fully conform to our views of the rights of the plaintiff, yet under the rule that in such cases the jury have a wide discretion, this court will not disturb it.

New trial. Scaling ordinance. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

Isaac G. Mitchell filed a bill against Rebecca B. Butt and Jesse M. Butt, charging that some time previous to the 14th of November, 1862, the defendants had purchased of Benjamin Rogers the south half of land lot number one hundred and thirty-two, containing one hundred and one and one-fourth acres, in the fourteenth district of Fulton county; that the defendants had not paid and could not pay one dollar of the purchase money; and that on the 14th November, 1862, they applied to complainant to make payment for them, and said that the land should stand bound to complainant until the purchase money was paid; that complainant did make payment on that day to said Rogers of the entire amount of said purchase money, to-wit: \$900 00, and thereupon Rogers made and executed to defendants a fee simple title to said land, and the defendants made and executed to complainant the following instrument in writing:

“ATLANTA, GA., November 14th, 1862.

“Two years after date, with interest from date, we promise to pay I. G. Mitchell the sum of nine hundred dollars (\$900 00) for the south half of land lot No. 132, containing 101½ acres, more or less, lying and being in the 14th district of originally Fayette, now Fulton county.

“Witness our hands and seals,

“REBECCA B. BUTT, [L. S.]

“JESSE M. BUTT, [L. S.]”

That said note was intended to cover the agreement that said land should stand bound for the purchase money, which was all paid by complainant, and none by defendants; that defendants had recently offered to sell said land in order to defeat said agreement, and that they were insolvent.

The bill prays for an injunction to restrain defendants from selling the land, and that a decree might be rendered fixing a lien upon the land for the purchase money, and for the sale of the land to discharge complainant's debt, and for subpoena, etc.

At chambers, December 24th, 1869, Honorable J. D. Pope, judge of the superior court, granted the injunction prayed for in the penalty of \$1,000 00.

The defendants answered that said Jesse M. Butt, in behalf of his wife, Rebecca B. Butt, did, on the 14th of November, 1862, borrow \$900 00 of complainant, and pay the same to said Rogers, and that the said Rogers, in consideration thereof made and executed to the said Rebecca B. Butt, on said day, a warranty deed, conveying said land to said Rebecca B. Butt in fee simple, and appended a copy of the deed to the answer as an exhibit; that thereafter, on the same day, the defendants made and executed the written obligation set out in complainant's bill, and that the sum of \$900 00 was the entire amount paid to the said Rogers as the purchase money of said land; that the written obligation contains the agreement made between complainant and defendants; that at the time of the execution of said written obligation the said Jesse M. Butt had no title to said land, and therefore could not bind the same; that he received no consideration for the said obligation; that the said Rebecca B. was, at that time, and still is, married to said Jesse M. Butt, who was still living, and that therefore the said written obligation was void, etc.

On the trial the complainant introduced the written obligation of said Rebecca B. and Jesse M. Butt, hereinbefore copied. He then read the depositions of Benjamin P. Rogers, as follows:

"I was the owner of south half of lot of land number one hundred and thirty-two, in originally fourteenth district of

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Fayette now Fulton county. On the 14th day of November, 1862, I made a verbal contract with Jesse M. Butt, Jr., several days before the deed was made. He said he would buy the place, and expected to get the money from Isaac Mitchell. We, (witness, Jesse M. Butt, Jr., and I. G. Mitchell,) came into W. M. Butt's office, and the deed was made. Isaac G. Mitchell paid me the purchase money. My recollection is that I made the deed to Jesse M. Butt, Jr., and his wife. I never received any compensation from Jesse M. Butt, Jr. The note hereto attached is the one given to Isaac G. Mitchell. I bought the lot of land by the number one hundred and thirty-two, and sold it by that number; I am not certain that its real number was one hundred and thirty-two. I did not know any person in the transaction but Jesse M. Butt; I don't know whether he was acting for himself or wife; Jesse M. and Rebecca B. Butt were living together as man and wife, and generally recognized as such in the community in which they lived at the time these papers were executed. I don't remember whether Rebecca B. Butt was present or not when the money was paid to me, but the money was paid by Isaac G. Mitchell at the same time that the deed was made; I was actually present when the papers were made. My impression was that Mitchell loaned Butt the money to pay for the land, and that the land was to stand bound for it. I don't recollect whether Mrs. Butt was present at any of these conversations about the land. That lot of land was improved when I sold it; about twenty acres was cleared, and there was a dwelling house, gin house, cotton screw, stable, crib, etc.

"I mean, when I say Mr. Mitchell loaned the money, that he furnished the money that paid for the land, and paid it to me. It was Confederate money. Butt never handled the money at all after I got it, and I don't know that he ever did before."

Complainant introduced his own depositions, as follows: "Mr. Butt lived in a little house on an adjoining lot of land, and wanted to move on the Campbellton road, to a well im-

proved place, to-wit: the one already described by witness Rogers. I agreed to pay Mr. Rogers the money if Butt would execute a mortgage lien upon the land to me, and we carried out what we considered to be a mortgage lien upon the land. I never loaned Butt the money and never placed the money in his hands, but when we came to make the papers I allowed the deed to be made to Jesse M. Butt, Jr., trustee for his wife, taking from the two the annexed note or paper, which we considered a mortgage lien. The land was to be Rebecca Butt's, provided they paid me the \$900 00 specified in the note. I do not remember whether Mrs. Butt was present when I had the understanding with her husband about the giving the mortgage lien or not. There was no other mortgage executed between me and Jesse Butt, his wife, or either of them. Before the war the land was worth \$900 00, and now it is worth about \$600 00. I understood that Jesse M. Butt, Jr., in the transactions in regard to this land, was acting for himself and wife. His wife never paid me a dollar."

By agreement of parties, a copy of the "Atlanta Constitution" was introduced in evidence, showing the value of gold in currency, at the date of the trial, to be one hundred and seventeen per cent., and also Barber's table showing the value of Confederate money at the date of the contract to be three for one, and subsequent value. The complainant closed. The defendants introduced no evidence. After argument, the court charged the jury as follows:

"If you should believe from the evidence in this case that the defendants purchased from Benjamin Rogers the tract of land described in complainant's bill, at the time therein specified, and that complainant advanced the purchase money for the defendants, and the defendants agreed that said land should stand bound to complainant for the money, and defendants executed and delivered to complainant the instrument described in complainant's bill, and said Rogers executed and delivered to defendants, or either of them, a deed to said land, it would be your duty to find for the complainant; if

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you believe otherwise, find for the defendants. If you find for the complainant, look to the value of the consideration of the note or instrument described in the bill, at any time, in order to ascertain the amount, and look also to the testimony and see what the intention of the parties was as to the particular currency in which the debt should be paid, and the value of such currency at any time, and render a verdict on principles of equity. It is not meant by this that you can change the contract, but the door is thrown widely open that you may see what was the true contract and administer it in its purity."

The jury found for the plaintiff \$120 00, and that the amount should be a lien upon the land as the purchase money.

The complainant moved for a new trial, on three grounds:

1st. Because the verdict of the jury was contrary to evidence, and manifestly and decidedly against the weight of the evidence, and contrary to the principles of equity.

2d. Because the verdict of the jury was contrary to law.

3d. Because the verdict of the jury was contrary to the charge of the court.

The motion was overruled, and complainant excepted.

D. F. & W. R. HAMMOND, for plaintiff in error.

J. M. CALHOUN & SON, for defendants.

McCAY, Judge.

We would have been better satisfied with the verdict in this case had the jury given the plaintiff a larger verdict; but, under the rule laid down by this court very shortly after the passage of the ordinance of 1865, the jury have a large discretion in these cases. This was, in fact, a loan of Confederate money; the plaintiff parted with no property. Under the circumstances, we held when this case was before us at a previous term, that he had a lien on the land for his advance; or rather, that the defendants were estopped by their deed from saying to the contrary. But when we investigate,

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as the ordinance of 1865 provides, the real truth of the case, in order to get at the true amount of lien, the question is at last what was the consideration passing from the plaintiff to the defendants? It appears that the consideration was the advance of Confederate money. What its value was at the time, or afterwards, or at the maturity of the debt, was a question for the jury under the ordinance and under the rule we have alluded to, and the judge refusing, as he has, to interfere, we (though, as we have said, are not satisfied,) will not do so either.

Judgment affirmed.

AUGUSTUS H. LEE; plaintiff in error, *vs.* WILLIAM W. CLARK, executor, defendant in error.

1. The question in this case as to the land having been discharged from the lien of the mortgage judgment, on account of the four years' possession by a *bona fide* purchaser, comes within the principle of the decision in *Akin vs. Freeman*, 49 *Georgia Reports*, 51, even if mortgage judgments are included in the provision of section 8588 of the Code.
2. Whether the witness who was rejected by the court, was or was not competent, is an immaterial question in this case, as it does not appear from the record that his testimony could have been of any benefit to the party offering him.

Mortgage. Judgment. Statute of limitations. Claim. Damages. Immaterial error. Before Judge HALL. Newton Superior Court. September Term, 1873.

William W. Clark, as executor of William D. Conyers, deceased, on October 29th, 1868, caused a mortgage execution, dated October 3d, 1860, based on a mortgage dated December 3d, 1859, against Turner Horton, for \$3,141 42, principal, and \$177 41, interest to September 22d, 1860, (the date of the judgment on the foreclosure,) and costs of suit, with a credit thereon of \$370 00, of date October 27th, 1863, to be levied upon the property described therein. A claim thereto

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was filed by Augustus H. Lee. Upon the issue thus formed, substantially the following evidence was introduced :

1st. The mortgage and execution, with all the entries thereon.

2d. Affidavit of illegality by Turner Horton and Augustus H. Lee setting up the dormancy of the judgment, and their desire to avail themselves of the benefit of the relief act of 1868, with the judgment of the court thereon in favor of the plaintiff for costs.

3d. The claim of Augustus H. Lee, with the usual issue formed thereon.

FOR THE CLAIMANT.

1st. Deed covering the premises in dispute, from Turner Horton to Augustus H. Lee, dated January 11th, 1864.

2d. The answers of O. L. Prophitt to a set of interrogatories, to the effect that William D. Conyers stated to him, about the last of February or first of March, 1863, that he was willing to receive Confederate money in payment of the mortgage debt ; that he remembered the conversation, for the reason that he was interested in having the mortgage debt paid off ; that his interest was as follows : He bought a tract of land from Horton, believing it to be free from all incumbrances. Upon his return to Covington in 1863 he was about trading the land, when he ascertained that it was embraced in a mortgage to Conyers. He called on Conyers to see if he could induce him to release that tract of one hundred acres, in order that he might sell it. He refused to release it, but said that he thought by seeing Horton the matter could be arranged in some way. Witness then arranged a meeting between Conyers and Horton at Covington.

That when Conyers returned home from the square where he had an interview with Horton, he passed directly in front of witness' office, called to witness, and stated to him that Horton had agreed to pay in Confederate money, and he had consented to accept it. That this occurred about ten o'clock in the morning ; that about two or three o'clock in the evening of the same day, Conyers came back to his office, and

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inquired if Horton was in ; that witness told him he was not, whereupon he said that he had declined taking Confederate money for the mortgage. That witness asked him his reasons. That he replied that Horton had seemed careless about the matter, had kept him waiting two or three hours to receive the payment, and that after consideration, he had concluded that he would rather have the debt than the Confederate money.

3d. Contract between Turner Horton and claimant, dated November 17th, 1870, by which Horton agreed to convey to claimant the premises in dispute, in consideration of claimant's conveying to him certain lands, and paying \$1,500 00 additional, the trade to go into effect on December 25th next thereafter.

4th. The claimant testified that at the time he made the trade Horton told him that a part of the purchase money had not been paid, but said nothing about a mortgage ; that he never knew of any mortgage until the levy was made. That he went into possession of the land in 1860, and has held it ever since ; that there was still due to Horton \$1,500 00 difference in the exchange ; that six hundred acres of the land was worth from \$4 00 to \$5 00 per acre, and the other lot from \$1,400 to \$1,500 00 ; that he never, at any time, offered to pay the purchase money to Conyers.

Claimant offered to prove by Turner Horton that O. S. Prophitt had informed him of the consent of Conyers to receive Confederate money in satisfaction of the mortgage execution ; that he communicated said information to the claimant, and that, in pursuance of said information, he (Horton) had tendered to Conyers sufficient Confederate money to discharge the mortgage, but he refused to receive it ; that he had told claimant that as Conyers would receive Confederate money, which he was ready to pay, he, claimant, could with safety give to him (Horton) a deed to the lands for which he had exchanged. That claimant, thereupon, in good faith, executed a deed to him for said lands.

The plaintiff objected to the competency of said witness, on

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account of Conyers being dead. The objection was sustained, and claimant excepted.

The court charged the jury, amongst other things, as follows: "A *bona fide* purchaser for a valuable consideration, of real property, is not protected by a continuous possession thereof for four years, against a mortgage execution existing at the time of the purchase, whether such purchaser, at the time of his purchase, had or had not knowledge of the mortgage execution."

The jury found the property subject, and awarded twelve and a half per cent. damages to the plaintiff. The claimant moved for a new trial, upon the following grounds, to-wit:

- 1st. Because the court erred in the aforesaid charge.
- 2d. Because the court erred in holding Horton to be an incompetent witness.
- 3d. Because the verdict of the jury was contrary to the evidence in this, that it allowed the plaintiff damages when there was no proof of the claim having been interposed for delay.

The court overruled the motion on condition that the plaintiff would remit the damages. To this ruling claimant excepted.

The plaintiff also excepted to the judgment, in so far as it required him to write off the damages. For decision upon this point, see succeeding case.

J. J. FLOYD, for plaintiff in error.

CLARK & PACE; PEEPLES & HOWELL, for defendant.

TRIPPE, Judge.

1. The question made in this case, that the land was discharged from the lien of plaintiff's judgment, comes within and is controlled by the decision in the case of *Akin vs. Freeman*, 49 *Georgia Reports*, 51. It is not necessary to pass upon the point whether mortgage judgments are within the provisions of section 3583 of the Code.

2. Whether the witness, Turner Horton, who was offered

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by claimant, was or was not competent, is an immaterial question, as it does not appear that the facts proposed to be proved by him could have been of any benefit to the claimant. If Dr. Conyers had agreed to take Confederate money for the debt, that could not have availed him, unless it appeared that he had been induced thereby to part with his security for his title. Even if that fact would have given him the equity he claims, it was not made to appear that he could prove he had on that account surrendered such security. The witness, Prophitt, testified that the promise was made the last day of February or first day of March, 1863. Claimant's deed to Zachary bears date January 1st, 1863—just two months previous. Horton, the defendant in the judgment, made his deed to the land levied on, to claimant, in January, 1864. No statement was made to the court below that these discrepancies between the facts which had been proved and those now claimed to be true, would be explained. Nor was any statement made that it could or would be proved that the claimant had, in fact, acted on the alleged promise of Dr. Conyers. From the facts which were in proof at the trial, and introduced by the claimant himself, it does not appear that the evidence of Horton could have been of any possible benefit to him. If it had been in his power to have explained the conflict which would have been apparent between what was in proof by himself, and what he proposed to claim under additional evidence, which was rejected, or if the rejected evidence, if admitted, would have necessarily left a hiatus, which he would have been compelled to have filled up to have made it pertinent to the issue, as he now insists he could do, the court should have been put in possession of the whole facts, and the record should show them, so that this court could intelligently pass upon them. We cannot send a case back upon a presumption that something may exist which was not proposed even to be proved, when the record could have so easily been made to disclose what is now asserted to be the precise and true *status* of the whole case.

Judgment affirmed.

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WILLIAM W. CLARK, executor, plaintiff in error, vs. AUGUSTUS H. LEE, defendant in error.

We do not think there was any abuse of the discretion of the court in requiring the plaintiff to write off the damages given by the verdict, as a condition to avoid the judgment for a new trial.

New trial. Damages. Claim. Before Judge HALL. Newton Superior Court. September Term, 1873.

For the facts, see the preceding case.

CLARK & PACE; PEEPLES & HOWELL, for plaintiff in error.

J. J. FLOYD, for defendant.

TRIPPE, Judge.

The claimant interposed his claim in November, 1869. One ground on which he relied was that he was a *bona fide* purchaser, and had been in possession of the land more than four years before the levy was made. The facts proved show that he was in such possession. The decisions of the courts from that time to 1873 was that section 3525, Revised Code, had never been suspended by any of the acts suspending the statutes of limitation, and that, therefore, such a possession from 1860 to 1864, or from 1864 to 1868, would discharge the land from the lien of the judgment. It is true these decisions were not made in cases of mortgage judgments; but whether mortgage judgments are or are not within the provisions of section 3525, which it is not necessary to pass upon in this case, it cannot, under the decisions as they then stood, be charged that a claimant, who made the issue that they did come within said section, interposed his claim for delay only. It was not a matter of vexatious litigation for a suitor to ask for a judicial determination of the question.

A contrary ruling to *Chapman vs. Akin*, 39 Georgia, 347, was not made until late in June, 1873, when it was held that

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said section was suspended during the war. This case was tried in September, 1873. It does not appear that the decision made in June as to this particular point was known to the parties at the time of the trial. Indeed, from the fact that it appears from the record that the case was made to turn upon the point whether mortgage judgments were included in said section and controlled by the former decisions, and that the charge of the court was confined to this view, it is to be presumed that the latter decision had not obtained general publicity. If so, and taking into consideration the shortness of the time between that decision and the trial of this case, it would be hard to say that the claimant was litigating for delay only. This seems to be the view that the judge who tried the case took of the matter when he required the plaintiff in execution to write off the damages given by the jury, or directed that a new trial should be granted.

Judgment affirmed.

GEORGE WHITE, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

If one enter a house with intent to commit a felony, but the entering is through an open door without any breaking, actual or constructive, the offense is not burglary, nor under our Code, section 4386, is it a sufficient "breaking and entering into," that having entered with intent to commit a felony he unbolts a door to get out.

Burglary. Before Judge POTTE. Madison Superior Court. September Term, 1873.

George White was placed on trial for the offense of burglary, alleged to have been committed on June 25th, 1873, by breaking and entering the dwelling house of one George L. Rice, with the intent to commit a rape upon the person of one Amanda J. Rice, and by having escaped from said house by breaking out of the same. The defendant pleaded not

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guilty. The jury found to the contrary. Whereupon the defendant moved for a new trial upon the following, among other grounds :

Because the court erred in charging the jury as follows : "As to what constitutes a breaking, I charge you in this case as follows : if you believe from the evidence that the prisoner entered the house of Rice without breaking, with the felonious intent charged in the indictment, to-wit : the crime of rape on Miss Rice, and if you believe from the evidence that he left the room of that house by opening a door, which door was then bolted, that there has been sufficient proof of breaking and entering, in contemplation of law."

The motion was overruled, and defendant excepted.

W. G. JOHNSON ; JOHN T. OSBORN, for plaintiff in error.

1st. Charge of the court as to what constituted "breaking and entering," was error. By the statute of Georgia, "burglary is the breaking and entering into a dwelling house, etc., with intent to commit a felony or larceny therein." The statute is so plain and simple that there is no necessity to resort to construction : R. Code of 1868, sec. 4320 ; 33 Ga., 229 ; 5 Wheat. U. S., p. 96 ; 14 Peters' U. S., 475. Breaking into cannot mean breaking out : Potter's Dwarris on Statutes, bottom of page 245. Breaking and entering cannot be construed breaking or entering : Potter's Dwarris on Statutes, p. 245, note 35, citing United States *vs.* Ten Cases of Shawls ; 2 Paine, 162 ; Potter's Dwarris on Statutes, pp. 247, 127 ; Section 10 of Vattel's Rules, page 143 ; Section 2 of American Rules, pages 199, 200 ; bottom of page 207, note 22, bottom of page 215, and page 285 ; 1 Russell on Crimes, side-page, 828 ; 1 Hale's Pleas of Crown, 554 ; 1 Bishop's Cr. Law, (4th ed.,) sec. 327, notes 8, 2.

2d. The statute of 12 Anne, upon which the state relies, is not of force in Georgia : See Schley's Digest and preface thereto, in which he says that the statutes enumerated in his Digest are the only English statutes of force in Georgia. Aside from this, the statute of 12 Anne is no authority in Georgia:

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See 11 Ga., 500, 4th head-note. The statute of 12 Anne is not binding on us as common law, because the meaning of burglary is settled by the legislature in Georgia. 2 Bishop's Criminal Law, section 105, (4th edition.) 12 Anne is not even declaratory of the common law: See 5th edition of Bishop's Crim. Law, vol. 2, sec. 100, and last part of that section on top of page 102.

SAMUEL LUMPKIN, solicitor general; J. B. ESTES, for the State.

The definition of burglary at common law, and under all our statutes, is substantially the same: 2 Black., 4th Book, side-page 224; 2 Bish. Cr. Law, (5th ed.,) secs. 80, 90.

Under the common law prior to the statute of 12 Anne, (A. D. 1713,) the law involved in the court's charge had been stated to be doubtful, though many of the authorities favor the views of Judge Pottle: See 2 Wharton, sec. 1536; 2 East., 488; 3 Greenleaf's Ev., 76; 1 Russell, 792; Bacon's Abridg., Title, Burglary, 133, 134.

The statute of 12 Anne of force in Georgia—It was of force May 14, 1776; not repealed till 7 and 8 George IV., in 1827: See 1 Russell, 792.

Act of 1784 adopted all the common and statute laws of England in force in the colony of Georgia on the 14th May, 1776, not contrary to our constitution, laws and form of government: Cobb's Digest, p. 721. See also act of December 19, 1860, which adopted Code of 1862-3. The constitution of 1865 adopted all such laws of force December 19, 1860. Similar provision in the constitution of 1868. This act is not in Schley's Digest, it is true, but that Digest is not infallible: 23 Ga., 89, 90, 91, 92. The various acts adopting our penal Code are not inconsistent with this statute of Anne.

But suppose this statute not of force in Georgia. It was simply declaratory of the common law—did not change it. 12 Anne declared the law before construed both ways: 2 Black., 4th Book, side-page 227; 2 East., 489, 490; Bacon's Abridgment, Title, Burglary, 133, 134; 8 Carr & Payne.

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See, also, on this point, 2 Bishop's Criminal Law, (5th edition,) sections 86, 99, and which intimates that this statute should be respected by our courts as declaratory of the sense of the English Parliament, *i. e.*, their sense of what the law was before the statute of Anne, and of which that statute was declaratory.

McCAY, Judge.

There was absolutely no proof of any breaking and entering into in this case, and to sustain the conviction the charge of the judge must be right. Either breaking out means also breaking into, or the statute of Anne, making "entering with intent to commit a felony and breaking out, burglary," is of force in this state. Ever since our first Code, (1833,) it has been the uniform understanding that we had no *crimes* in this State save such as were defined and punished in the Code. The Code of 1833 defined burglary to be the breaking and entering into, etc., and this definition has been reiterated in each of our Codes, and in each of the many acts we have passed modifying and extending the crime of burglary. Had it been the legislative will that the statute of Anne should remain of force, or that the words "breaking and entering into" should be subject to the construction insisted on, we think the failure to express it in some of the Codes, or in some of the acts, of which we have had many, modifying and extending the crime of burglary, is inexplicable. We are driven by our convictions, therefore, to the conclusion that Judge Pottle went too far in holding that the statute of Anne alluded to was of force in Georgia, or that the words "breaking and entering into" may be construed to mean entering into and breaking out. That criminal laws must be construed strictly is universally admitted.

Our statute defines burglary. We go to the common law to get the meaning of the words used, as, for instance, that raising a window or opening a closed door is breaking, and that entering does not require that the whole body go in. But to say that where the words used are "breaking and en-

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tering into," this may mean entering into and breaking out, because by the statute of Anne this was also made burglary, is pushing the admitted right to go to the common law for the meaning of words to an unwarranted extent. It required a statute in England to do this; our statute uses the common law words as they stood before the statute of Anne, and we think they are to be taken to mean what their plain language imports.

We do not go into the evidence, except upon this one point of breaking into. We will only say that if the prisoner's confession be simply the reply of the prisoner to the magistrate, or to his *amicus curiae*, as to whether he was guilty or not, that it ought not to be used against him. If a formal plea of guilty may be withdrawn, and a plea of not guilty substituted, it would seem to follow that if withdrawn and a plea of not guilty put in, the plea of guilty simply goes for nothing. The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty.

Judgment reversed.

MARY JOHNSON, plaintiff in error, *vs.* **JOHN QUIN**, administrator, defendant in error.

1. A charge unwarranted by the evidence is error.
2. Where an action is brought on an account for services rendered, a recovery may be had on a special contract where the bill of particulars sets out fully the terms.

Charge of Court. Contracts. Pleading. Evidence. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

For the facts of this case, see the decision.

G. E. THOMAS, for plaintiff in error.

R. J. MOSES, for defendant.

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WARNER, Chief Justice.

The plaintiff brought her action against the defendant on an account for services rendered the defendant's intestate in his lifetime. On the trial of the case the jury, under the charge of the court, found a verdict for the defendant. A motion was made for a new trial, on the ground of error in the charge of the court to the jury, and because the verdict was contrary to the weight of the evidence, and for newly discovered evidence, which motion was overruled, and the plaintiff excepted.

1. The court charged the jury "that if the services had been rendered, and plaintiff had been paid for them, she could not recover." This charge of the court was error, as we find no evidence in the record which would authorize it. The court also charged the jury "that if plaintiff lived with deceased as his mistress, and in that capacity she rendered the services for which she was demanding payment, she was not entitled to recover." This charge of the court was error, there being no evidence in the record to authorize it.

2. The court charged the jury "that the plaintiff in this action could not recover for a breach of an express contract, but on an implied one, to-wit: for the value of the services proved to have been rendered." This action was brought under the 3393d section of the Code. The bill of particulars annexed to the plaintiff's declaration sets out the terms of the contract, to-wit: that the defendant's intestate was to pay her \$40 00 per month for her services as housekeeper, cook, etc., from the 12th of May, 1868, to the 29th of August, 1871, \$1,580 00. According to the construction heretofore given to this section of the Code, and the act of 1847, from which it is taken, by this court, the plaintiff could have recovered by proof of a special contract to pay her \$40 00 per month, as stated in the bill of particulars: See Code, section 3393, and decisions there cited. We are, therefore, of the opinion that the court erred in its charge to the jury in relation to this point in the case.

Let the judgment of the court below be reversed.

BRYAN & HUNTER, plaintiffs in error, vs. MARY E. KING, defendant in error.

1. To justify the granting of the injunction in this case, it should have been made distinctly to appear that the money of the wife was put in the firm business without the knowledge or consent of the wife, and as this is not even distinctly stated in the bill, the injunction ought, for this reason, to have been refused.
2. There is nothing in any of the facts, as they appear from the bill, answers and affidavits, to make out a case of constructive notice; nor do the statements in the bill, made as they are on information and belief, or the affidavits, or any of the circumstances, make such a case of notice as justifies the judge, under the positive denials in the answers, in granting the injunction and impounding the proceeds of the factory.
3. As the defendant King, the husband of complainant, was a resident of Pulaski county, and as the property can only be reached by establishing the trust and the complicity of the other defendants with him in the breach of it, the bill was not improperly filed in Pulaski county.

Injunction. Jurisdiction. Venue. Husband and wife. Separate estate. Notice. Before Judge HARRIS. Pulaski county. At Chambers. October 20th, 1873.

This case is sufficiently reported in the opinion.

JACKSON, LAWTON & BASINGER, for plaintiffs in error, submitted the following brief :

I. The demurrer for want of jurisdiction in the court should have been sustained : Code, 4132 ; 27 Ga., 353.

1st. No question of title to land is involved in the controversy : Smith vs. Bryan, 34 Ga., 53, 61, 62.

2d. No "substantial relief" is sought against King. The amended bill, pretending to pursue him as the agent of plaintiffs in error, did not give jurisdiction to the court : Taylor vs. Cloud, 40 Georgia Reports, 288 ; Ellis vs. Lamar, 44 *Ibid.*, 9. The bill alleges that Bryan & Hunter, the only defendants against whom substantial relief is sought, as also Lamar, are residents of Chatham county.

II. The demurrer to the bill for want of equity should have been sustained. To make out a case for relief against

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Bryan & Hunter, the bill should present a clear case as against Clifford A. King. This it has failed to do.

1st. In the allegations that King received the property as her husband, and "her agent," and placed it in the business of Lamar & King, in December, 1870, the bill admits that, so far as third persons might be concerned she had given him absolute control of it: *Wyllie et al. vs. Collins et al.*, 9 Ga., 238.

2d. There is no attempt in the bill to resist this conclusion of the law by an averment that King sold the property so received, as her agent, and placed the proceeds of such sales in the business of Lamar & King without her consent. The pleading will be taken most strongly against the pleader. The law presumes that he changed the investment with her consent, and if loss has resulted from the new investment, he is not liable therefor: *Campbell vs. Miller et al.*, 38 Ga., 304.

3d. There is no sufficient charge of fraudulent misapplication of trust fund to warrant the implication of a trust: R. Code, sec. 2290. When fraud is the gravamen of the case, such fraud, in the facts which constitute it, should be plainly, fully and distinctly set out: 3 Hare., 407, 500, 501; 6 How. M. R., 314; *Powell vs. Parker et al.*, 38 Ga., 644, 646; *Jones vs. Hodges*, 14 Ga., 715, 717. Argumentative and inferential charges are not sufficient: *Battle vs. Stephens*, 32 Ga., 25, 27.

III. But, even assuming that the bill has made out a clear case of liability as against King, it has failed to extend that liability to Bryan & Hunter. It has not averred notice to them that King had changed the investments of defendant's property without her consent: *Connelly vs. Cruger*, 40 Ga., 262.

LANIER & ANDERSON; C. C. KIBBEE, for defendant.

McCAY, Judge.

1. This case has its origin and its complications from the act of 1866, providing that property coming to the wife dur-

ing coverture shall not go to the husband but to her. Here seems to have been a handsome estate, distributed by agreement among the heirs-at-law to the wife and her husband jointly, as though under the law it belonged to both. It seems to have gone into the hands of the husband without any objection by anybody, and to have been used at his discretion. It was partly in money and partly in property. The wife seems to have joined with her husband in turning the realty into cash, and to have consented that the whole proceeds should go into her husband's hands. He put it as capital into the partnership business of Lamar & King. The money had no ear-marks, and Lamar & King in possession of it were large and apparently responsible dealers in real estate. The world knew nothing of the origin of their resources, and dealt with them as though the capital in their possession was truly theirs. Surely it cannot be contended, because the money on which they traded was in fact the property of King's wife, that all the property passing through their hands is subject to the wife's claim. If the money had been stolen, *this* would not be true, much less can such a claim be set up when it affirmatively appears that the money went into the husband's hands by the wife's consent. The bill does not admit or plainly deny that it was put into the firm business with her consent, though Lamar in his affidavit says in terms that it was. Nor is this statement of Lamar's anywhere denied. If a married woman sees fit to permit her husband to trade upon her money as his own, she must take the consequences. Persons dealing with the husband are not bound to do so at their peril. The wife stands in this respect like anybody else. As to her property she is *sui juris*, and can deal with it as she pleases, subject only to certain provisions provided by law for her protection against her husband. If her means are in money she may spend it, loan it, trade on it, or give it away, as other people may their money. If she trusts her husband with it, she does so at her own risk. If she gives it to him for one purpose, and he applies it to another, she has the same rights as to him, and as to those

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dealing with, as other people would have trusting him with money. He is her debtor or her trustee, as he would be the debtor or trustee of others under like circumstances.

If, then, this money was put into the business of the firm by the wife's consent, she is a creditor only of the firm, and has the rights of a creditor. That she is a woman, or the wife of one of the partners, does not make a case of trust different from what it would be if she were a man, or of no kin to either party. It is therefore fundamental in this case that it shall appear that she did not freely loan this money to be put as capital in this business. If she did, it is not a case of trust, but one of the relation of debtor and creditor. And however her husband may be in her debt she has no claim to the title of property passing through the hands of the firm, even though it be bought with the money she loaned. Nor would she have such claim though the purchaser knew that she furnished the means on which the firm was operating. It does not appear by the bill what is the truth as to this matter. She seems to have freely consented to her husband having her money. What he was to do with it she does not say. Lamar says it was there by her consent, and that she was to get a reward of some kind for the use of it. What, he does not say. We think the bill is not sufficiently definite on this vital point to justify the injunction.

2. Assuming, however, that this money went into her husband's hands to be used as her agent and for her benefit, and that its application to the business of the firm was a misuser and a breach of trust, the question arises, what evidence is there that this property was bought by the firm with her money, and if so, what notice did Bryan & Hunter have of this fact? By the statements of the bill most of the money went into the husband's hands late in 1870 and 1871. At the time this property was bought, February, 1872, and January, 1873, the firm had been dealing in real estate, buying and selling, for from one to two years; and when Bryan & Hunter lent their credit and took the deeds and gave the bonds, the firm had, in the course of the business, become

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indebted to various other persons to the amount of about \$24,000 00. Is it at all apparent that this property was bought with *her money*? Is it not on the contrary, very plain that the debts due to G. B. Lamar, to Bishop Persico and to Baldwin, part of the price of this property, were paid, not out of her money but out of the proceeds of Bryan & Hunter's drafts. Nor is it at all apparent that the balance of the consideration paid by the firm for these very lands and factory, was not the proceeds of the debt due to N. A. Hardee & Sons and to Bryan & Hunter, for their previous advancements. Even a *prima facie* case is not made out by showing that early in 1870 the firm got her money. These lands were bought in January, 1873. What losses the firm met with before this, what expenditure of its means had occurred, does not appear. It is, however, a significant fact that at the time the defendants took the deeds and gave the defeasance bonds, the firm was in debt to other persons than Mrs. King, \$24,000 00. What right have we to say that Mrs. King's money bought this property rather than the money of their other creditors? The bill does not say in terms that her money bought it. The statement is that her money having gone into the business, it was, after passing through other enterprises, at last invested in these lots and this factory. As we have seen, however, this is plainly not so, as to Lamar's, Persico's and Baldwin's debts, nor is it at all plain that it is true of the remainder of the purchase money. The inference is just as fair that Mrs. King's money was lost as it is that Hardee & Sons' money and the \$8,000 00 due Bryan & Hunter was. Clearly Mrs. King would have no right to follow this property on the ground that King & Lamar are her debtors. To make out her case it must appear that *her money*, specifically, was perverted from its proper use by her agent and invested thus. But at last, even if this property, or a portion of it, was in fact bought with Mrs. King's money improperly appropriated by her husband, her right to follow it is still dependent upon notice to Bryan & Hunter of this perversion. What is the evidence of this notice?

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1st. The bill so charges. But a reading of the whole bill shows that she makes this charge only on information and belief. A charge so made is not sufficient to justify an injunction, if it be expressly denied in the answer. The other facts from which notice is claimed to be made out, are:

2d. That it was notorious in Savannah that Mrs. King inherited a handsome fortune from her father, and that King, her husband, was in 1870 an applicant to be declared a bankrupt.

3d. It is contended that the paper recorded in the record of deeds of the division, or partial division, of her father's estate, is constructive notice.

4th. It is claimed that the act of Bryan & Hunter in taking the deeds and giving the bonds, and especially in canceling the bonds, in which papers the wives of both King and Lamar were joined, indicated that Mrs. King was supposed to have some interest in these lands.

5th. King's statement, by affidavit, that just before the bonds were canceled, he informed Bryan that he had received a large sum from his wife's estate, and his further statement that he agreed to secure his wife's signature to prevent complications.

It seems to us that as evidence of notice to Bryan & Hunter that these lots and factory were the product of the misapplication by King of his wife's funds, entrusted to him as agent, each and all of these facts are but of trifling moment. Bryan & Hunter expressly deny notice in the answer, though they acknowledge they knew Mrs. King was the daughter of Mr. N. A. Hardee.

Is every man in Savannah to be charged with notice, not only that Mrs. King got a handsome estate on the death of her father, but that her husband was insolvent and was dealing on her funds. It seems to us that this is absurd. In so large a city as Savannah, it would be outrageous to make any assumption of notice from such facts as these. The copy of the division is not, in our judgment, constructive notice; so far as it passes title to the lands of Mr. Hardee, it is notice

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of the title. But that it all ; it is constructive notice of that but of nothing else. No man is expected to go to the record except to see as to the property he is dealing with. If the title is on record he is charged with notice, because he has no right to deal concerning the land without inquiry.

But there is no law charging a man with *constructive* notice that a woman has a separate estate because there is a deed on record conveying such an estate to her, except so far as to make him deal at his peril with the property described in the deed. The taking of a deed from the partners and their wives and giving a bond of defeasance, and the subsequent cancellation of that bond, was nothing but what the act of 1871 requires when the parties take that method of securing a debt. The statute requires the deed to be signed by the wife, though she may have no separate estate or interest in it. The cancellation of the bond, as it was made to the husbands and wives by the signature of both, has, as we think, no significance as notice of any interest of Mrs. King. There is no pretense that Mrs. Lamar had any interest. Nor does the affidavit of King prove anything more than that after Bryan & Hunter's money had been got and paid out and the deeds been made, and he and Lamar had failed to pay, he told Bryan that he had received a large sum from his wife's estate. Suppose he had, was that any notice to them that he had invested it in these lands, or could that relate back so as to charge Bryan & Hunter with notice at the time their money was advanced ? It seems to us that these general facts are nothing to rebut the positive answers of Bryan & Hunter, coupled with the great and admitted facts that at the time the deeds were made Lamar & King owed to other persons a sufficient amount to account for all their dealings without any resort to a suspicion that King was abusing his wife's confidence by the use of her money, and that a large portion of the money advanced by Bryan & Hunter went to pay the debts due for this very property.

We feel sorry for the fate of this lady's fortune; but it is unjust to parties dealing in good faith with this firm to charge

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them with notice of Mr. King's misuse of his relations to her on such slight grounds as this record presents. No harm can come from dissolving this injunction. The pending bill is *lis pendens*, and any purchaser of property fully described in the bill is charged with constructive notice of her claim. The remedy of injunction is a harsh one. The impounding of the proceeds of the factory, in effect, stops its operation, for no one will run it under such a limitation of its use.

3. Upon the question of jurisdiction we think the court was right. It is a *sine qua non* in this case to establish the trust in King. He is a necessary party to that issue. The defendants are liable, if at all, only on the ground that they are in complicity with him in his abuse of his wife's trust to him as her agent. The fact of his insolvency does not, in our judgment, alter the case. Legally, his interest is the same, and he is a substantial party, and a substantial decree may be had against him, in the sense of the law. He is not a mere agent, like a sheriff executing a process, but a real party.

Judgment reversed.

WILCOX, GIBBS & COMPANY, plaintiffs in error, *vs.* JOHN A. HOWARD *et al.*, defendants in error.

Where an action was brought on notes given for guano sold, and the defense set up was that the article was worthless and not reasonably suited to the use intended, upon which point the evidence was conflicting, and it appeared that at the time of the sale plaintiffs' agent delivered to defendants a jar containing some of said guano, telling them to keep it until the crop matured, and if dissatisfied they might select any chemist in the United States to analyze the sample, and if it did not come up to plaintiffs' published analysis they need not pay for the same, but the jar was lost and its contents never were analyzed: Held, that it was error in the court to refuse to charge the jury "that to entitle the defendants to a verdict in their favor they must show clearly that their bad crop resulted from the worthlessness of the guano."

Sales. Warranty. Charge of Court. New trial. Before Judge HILL. Houston Superior Court. May Term, 1873.

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This case was tried before Judge COLE at the December adjourned term, 1872, of Houston superior court. The motion for a new trial was heard before Judge HILL, the successor of Judge COLE, at the May term, 1873.

For the facts of this case, see the decision.

DUNCAN & MILLER, for plaintiffs in error.

WARREN & GRICE, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants on two promissory notes. The defendants pleaded that the notes were given to the plaintiffs for guano which was worthless and not reasonably suited to the use intended. On the trial there was conflicting evidence as to the qualities of the guano as a fertilizer, and also evidence as to the unfavorable season for the use of fertilizers that year, and as to the bad cultivation of defendants' crop. The jury, under the charge of the court, found a verdict for the defendants. A motion was made for a new trial, on the several grounds stated therein, which was overruled by the court, and the plaintiffs excepted. The plaintiffs requested the court to charge the jury, in writing, that to entitle the defendants to a verdict in their favor they must show clearly that their bad crop resulted from the worthlessness of the guano. The refusal of the court to give this request in charge to the jury, with others, is one of the errors complained of in the motion for a new trial. It appears from the evidence in the record that plaintiffs' agent, when defendants purchased the guano, from him, gave to them a portion of it in a jar, told them to preserve it until the crop of 1871 matured, and if they were dissatisfied with the guano they might select any chemist in the United States and have it analyzed, and if the sample did not come up to the plaintiffs' published analysis of his guano defendants need not pay for the same. The defendants ad-

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mit receiving the jar of guano from plaintiffs' agent, but by some means it was lost, and its contents were not analyzed. The plaintiffs' published analysis of their guano does not appear to have been offered in evidence at the trial.

On the trial of cases like the one now before us the object of the courts should be to protect the rights of the fair and honest vendor of fertilizers on the one hand, and to protect the planter on the other, against the fraudulent sale of a spurious, worthless, article. In view of the evidence contained in this record we are of the opinion that the plaintiffs' third request, "that to entitle the defendants to a verdict in their favor they must show clearly that their bad crop resulted from the worthlessness of the guano," should have been given in charge by the court to the jury, and that it was error in refusing to do so.

Let the judgment of the court below be reversed.



JOSEPH PORTER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

On the trial of an indictment for gaming it was in proof that the parties played for checks or "chips," which represented certain sums, which chips, when presented, were redeemed by the dealer at the price they represented:

Held, that this was playing for a thing of value, and the conviction was right.

Criminal law. Gaming. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

Porter was placed on trial for the offense of gaming. He pleaded not guilty. The evidence showed that at the time charged in the indictment the defendant engaged in a game of "ten cent faro." That he had four or five "checks or chips" which he placed on a card as a bet; that these checks each represented ten cents, and would be redeemed by the dealer at that price when presented.

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There was no testimony showing that the defendant paid any money for said checks.

The jury returned a verdict of guilty. The defendant moved for a new trial, because the verdict was contrary to the evidence. The motion was overruled, and defendant excepted.

A. B. CULBERSON, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

McCAY, Judge.

The statute makes gaming to consist of playing, etc., "for money or other thing of value." Why are not "checks," "chips," and things of this character, just as much things of value as bank notes? They are both of them only the representatives of value. If a check is good when presented to the banker or dealer for twenty-five cents or one dollar, according to its stipulated value, we are unable to see how it fails to come within the statute any more than if the keeper of the bank had written his formal promise to pay, or the bet had been for as much money as the check or chip represents. In fact, that is the truth of the case. The bet is really for money, and the check is merely to aid in keeping the account as well as for convenience.

We suspect this case is only brought here for delay and not really to test the legality of the conviction, and we are sorry we are not able to add to the penalty fixed by the judge for this trifling with the public tribunals.

Judgment affirmed.

PETER HINES, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The evidence for the state not being sufficient to authorize a conviction, the verdict will be set aside and a new trial ordered.

Hines vs. The State of Georgia.

Criminal law. New trial. Before Judge STROZER. Dougherty Superior Court. April Term, 1873.

Peter Hines was placed on trial for the offense of larceny from the person, alleged to have been committed on March 26th, 1870. The defendant pleaded not guilty. The evidence for the state presented the following state of facts:

About the time charged in the indictment one Ben Randall attended an auction at Cooper's store, in the town of Albany. He had in his pocket-book a fifty dollar bill, a five dollar bill and a ten cent piece in silver. He loaned to George Barber the five dollar bill. Wishing to pay for a pair of pants which he had purchased, he handed the fifty dollar bill to Mr. Cooper, who returned the change, after deducting \$2 00, the price of the pants. Randall put the change in his pocket-book, and placed said book in his right hand pants' pocket. He was standing by the counter. Defendant was sitting on a stool directly against Randall when the money was changed, and saw the entire transaction. About five minutes after this, Randall looked for his pocket-book and it was gone. Defendant had just left. As soon as the money was missed, Mr. Cooper had the doors closed, and permitted no one to leave until he had been searched. Mr. Cooper searched the white people and Randall the black. Neither the book nor money could be found. About twenty persons, mostly colored, were present when the pocket-book was lost. Randall can tell bills from \$1 00 up to \$5 00, but beyond that he is unable to distinguish one from another. Mr. Cooper testified that it was a fifty dollar bill he changed for him.

The evidence for the defense is omitted as unnecessary to an understanding of the decision.

The jury found the defendant guilty. A motion was made for a new trial, because the verdict was contrary to the evidence. The motion was overruled and defendant excepted.

HINES & HOBBS, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of "larceny from the person," and charged with taking from one Randall \$48 10, with intent to steal the same. On the trial, the jury found the defendant guilty. A motion was made for a new trial, on the grounds that the verdict was contrary to law, contrary to the evidence, and without evidence; which motion was overruled, and the defendant excepted. In looking through the evidence on the part of the state, it is not sufficient, in our judgment, to authorize a conviction of the defendant, under the law, for the offense alleged in the indictment, and it was error in overruling the motion for a new trial.

Let the judgment of the court below be reversed.

THOMAS WAIR, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where on the trial of A for murder, it was in proof that A and B came to where the deceased was at work, and that the killing took place after an altercation in which A and B joined :

Held, that it was not error in the court to permit the state to prove that B had, in A's presence, not long before the killing, inquired of the witness if the deceased was at work at the place he was killed, especially as the further proof was that A then said he would give the deceased a lick if he said what he heard he had said.

2. It is not error in the judge, on the trial of a case of murder, after fully charging the jury as to the law applicable to the facts as they appear in the proof, to fail to charge the jury that section of the Code which provides that all other cases standing on the same footing of reason and justice shall be justifiable homicide.

3. As the defendant is clearly guilty of murder, if the principal witness for the state is to be believed, and as the prisoner's own confession makes very nearly, if not quite the same offense, we cannot say the verdict is illegal.

4. When the jury in a murder case, without any suggestion from the judge to mislead them in their verdict of guilty, recommend the prisoner to the mercy of the court, the verdict is not for this reason illegal,

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the verdict not being founded solely on circumstantial evidence, and the court will not hear the affidavits of jurymen that they misunderstood the effect of their verdict.

Criminal law. Evidence. Charge of Court. Jury. Verdict. Recommendation to mercy. Before Judge HOPKINS. DeKalb Superior Court. September Term, 1873.

Wair was placed on trial for the offense of murder, alleged to have been committed upon the person of Lidwell B. Womack, on November 14th, 1872. The defendant pleaded not guilty.

The facts present substantially the following case :

One Frank Robinson, who was jointly indicted with the defendant, had had a law suit with the deceased, upon the trial of which the defendant was his principal witness, and testified directly contrary to the evidence of the deceased, and caused him to be unsuccessful in the litigation. This produced considerable feeling between deceased upon the one part and defendant and Robinson upon the other. The case made by the prosecution rested mainly upon the evidence of a colored man by the name of Harrison Marable, and the confessions of the defendant made to John Baxter, the sheriff of DeKalb county, about one week after the homicide. The former testified in substance as follows :

Deceased and witness were at work together in a ditch on the land of the former when the defendant and Frank Robinson came up. It was about three o'clock, P. M. They came down the ditch from Robinson's house ; had guns with them. They spoke to deceased in a friendly manner. Robinson said that he was going to make a good wood pasture, and wanted the deceased to allow his cattle to stay in the field. Deceased replied that it was all right. Something was then said about the ditch. Robinson asked deceased who swore a d—d lie about the ditch ? Deceased replied that he did not say that any one had sworn a d—d lie, but that he (Robinson) swore contrary to his (deceased's) testimony. About that time defendant turned and wanted to whip deceased. De-

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ceased jumped back and defendant followed him. Robinson then said that he was going to kill a G—d d—d s—n of a b—h. They hallooed, and Mr. David Dees (also jointly indicted with the defendant,) came up. Deceased got out of the ditch and commenced walking towards his house. Dees told him to stop for a few words. Robinson then threw his coat off and Dees asked if he would cut it out or fight it out. Deceased replied that he did not take his knife to fight with. Dees asked him who swore a d—l lie. Deceased replied that nobody swore a d—d lie. "Dees made at him." Deceased walked off, and got over the fence, going home. Robinson said : "Follow after him, kill the d—d s—n of a b—h." He spoke to defendant, who laid down his gun and went after the deceased. He cut deceased before the latter thought of shooting him ; he caught him on the other side of the fence, and cut him in the back and sides. Deceased then fell to the ground and shot defendant. "Defendant then let in to cut him until he killed him." Deceased arose, walked a few steps, and fell dead. Robinson took defendant home ; he walked as straight as witness. Did not swear upon the committing trial, and has not stated to any one that witness was in the ditch at the time of the fight and could not see it ; he followed right after deceased, and had reached the top of the fence at the time of the fight. Did not swear upon the committing trial and has not stated to any one that the defendant was on top of the fence at the time deceased fired.

John Baxter, sheriff, testified, substantially, as follows: Arrested defendant ; had a conversation with him about one week after the homicide ; he stated that the difficulty originated from a law suit between Robinson and deceased ; that he and Dees were witnesses for Robinson ; that Robinson wanted him (defendant) to go with him and see deceased in reference to allowing some cattle to remain a few days in a field of his ; that he replied to Robinson that he would not go unless he promised not to name the ditch (the subject of the law suit;) that Robinson thus promised, and defendant consented to go ; that they talked with deceased in reference

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to the pasture, and agreed upon that subject ; that nothing was said out of the way ; that defendant then told deceased that he supposed that he said that Robinson and he (defendant) swore damned lies about the ditches ; that deceased replied that he did not say so, and Squire Tilly would certify to the same ; that defendant then said that he would die before he would take that lie ; that defendant said no more until deceased started off, when he followed him up to the fence ; that deceased got over the fence and defendant on top of it ; that they were talking to each other all this time, but defendant failed to state what about ; that deceased went eight or ten steps beyond the fence, then turned and came within four or five steps of defendant with his hand behind him, drew his pistol and shot him ; that defendant then said : "You have killed me, and I will kill you if I can ;" that defendant made at him, cut him a time or two, and threw him on the ground ; that while he had hold of him deceased snapped his pistol once or twice, but did not know which way it was pointed ; that when defendant threw him on the ground the pistol flew out of his hand and a bottle out of his pocket ; that deceased begged him not to kill him, and he let him up ; that deceased started off, cursing him ; that defendant caught him again, threw him on the ground, and cut him a few times more ; that deceased got up, walked a few steps, and fell dead. The pistol used by deceased was a small five shooter ; one chamber was discharged, and the caps on two other chambers were indented as if they had been snapped. The defendant was badly wounded ; the bullet entered just below the right nipple ; he remained at his house about six weeks ; was then brought to the jail in a spring wagon ; he escaped since the last term of the court ; he bored out of jail with an auger ; he was recaptured in Milton county ; the family of defendant live in DeKalb, not far from the Milton county line.

James Reeves testified to being present at a corn-shucking about one week before the killing, at which deceased, Robinson, Dees and defendant, were also present ; that a difficulty was then imminent ; that it was prevented by the crowd

present; that witness asked defendant not to have a fuss; that he replied he would not, but that if deceased had said what he had heard, he would knock him down—he intended to have satisfaction.

Robert Ellis testified, in substance, as follows: Saw defendant and Robinson together on the day of the homicide. Defendant said that if deceased told him he had sworn a d—d lie, he would give him a lick that it would take him some time to get over. This occurred about ten o'clock in the morning. They were going hunting; had guns with them. While defendant was there, Robinson asked if deceased was at work on his place. Witness replied that he did not know.

This question of Robinson and the answer of the witness were objected to by the counsel for defendant, on the ground that no concert of action had been shown between defendant and Robinson. The objection was overruled, and defendant excepted.

Defendant then made the statement about giving deceased a lick, etc.

Some additional testimony was introduced for the prosecution, not considered material.

Dyer Copeland, the brother-in-law of defendant, and also of Dees, John Chestnut, Robert Wilkinson, Samuel S. Harman and James Pierce, a brother-in-law of defendant, all testified that Harrison Marable, on the evening of the homicide, stated that at the time the shot was fired by deceased, he (Marable,) was in the ditch and defendant on top of the fence; that, consequently, he could only see defendant from his waist up; that he could not see defendant and deceased at all when they were fighting.

John W. F. Tilley and William J. Donaldson, justices of the peace, testified that upon the committing trial of Robinson, which was before them, they had great difficulty in obtaining a consistent statement from the witness, Harrison Marable; that he was confused; that his evidence, on the whole, was in accordance with his statements made to the

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above mentioned witnesses in reference to the location of the various parties.

William J. Donaldson further testified that he was at a corn-shucking a short time before the difficulty, some two or three weeks before; that deceased and defendant were both there; that he was compelled to command the peace; that defendant was talking, not directly to deceased, but about him, and witness thought it likely the peace was about to be broken; that from the language used by defendant, he thought he was mad; that Robinson and Dees were at the corn-shucking, but does not remember where they were when he commanded the peace.

Mrs. Scinthia Norris, the aunt of the defendant, and her husband, James Norris, testified, that Harrison Marable, on Christmas eve after the killing, made the same statements to them as to the location of the various parties at the time of the homicide, as already stated by the other witnesses for the defense.

Robinson testified to facts which would have gone far towards the justification of the defendant. His evidence was unsupported by any other witness.

It was shown that deceased was cut in seventeen different places, six of which wounds would have proved fatal; that the defendant was shot some three inches below the right nipple and about four and a half inches from the centre of the breast, the ball taking an upward and outward direction towards the right shoulder; that the wound was very dangerous; that the ball was still in the body of the defendant, having lodged under the shoulder blade.

The jury found the defendant guilty and recommended him to the mercy of the court.

The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the court allowed, over the objection of defendant's counsel, the prosecution to prove by Robert Ellis that Frank Robinson inquired of him whether deceased was at work on his place that morning, it not appearing that there

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was any conspiracy between defendant and Robinson at that time.

2d. Because the court, after having given in charge to the jury the sections of the Code referring to murder, manslaughter and justifiable homicide, failed to charge section 4268 of Irwin's Code, which is as follows: "All other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide."

3d. Because the verdict of the jury was agreed upon after it had been affirmed by jurors, during the consideration of the case, that a recommendation to mercy would authorize the court to sentence the defendant to imprisonment in the penitentiary, and the verdict would not have been rendered had it been believed that it would have resulted in a sentence of death.

4th. Because the verdict is contrary to the law and the evidence.

In support of the third ground the affidavits of two of the jurors were filed.

The motion was overruled, and the defendant excepted.

HILL & CHANDLER; GARTRELL & STEPHENS; HILLYER & BROTHER, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

MCCAY, Judge.

1. We think it was not error in the judge to admit the evidence that the defendant had inquired for the deceased, and whether he was at work at the place of the killing at the time the inquiry was made. Under the facts as they were developed, it was of much importance to the truth of the case to know whether the meeting between the defendant and the deceased was casual and accidental or was intended by the defendant. Did he go to where deceased was with intent to meet him, or having other purposes in passing that way? Was the meeting accidental or even incidental? This evi-

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dence tended to shed light on that inquiry. Why inquire for the deceased? Why remark that he would give him a lick under certain circumstances? We think this fact was an important one, and indicated that much of the story told by the prisoner and those with him is not correct. We think it may be fairly inferred from this inquiry and this threat, that the meeting was intended, and that the prisoner and his party went to where deceased was at work with a set purpose to have a difficulty. This is a large element in the whole case, and goes of itself very far to cast suspicion on the theory of the defense and to justify the jury in believing the state's principal witness.

2. We think also the judge was right in refusing to charge section 4334 of the Code. There was nothing in the evidence to call for its application. The Code undertakes to specify instances of justifiable homicide, as self-defense, etc. It also specifies instances where the law makes a killing manslaughter only; it then in its care for human life, and in consideration of the known truth that it is impossible to foresee all contingencies, declares that all other cases standing upon the same footing of reason and justice, shall be dealt with in the same manner. It does not mean that we have no law of murder, and that in all cases the legal guilt or innocence of the prisoner are to depend on the enlightened conscience of the jury. There are no unusual, extraordinary circumstances here; nothing that human foresight might not well foresee. It is the old story of human passion and human disobedience of the laws of God and man, which began with Cain, and will be continued, we suppose, until the last trump sounds. Either the defendant is guilty under the plain letter of the law, or he is innocent, or guilty only of some lesser offense than murder, under the expressed cases put by the Code. There is nothing unusual or exceptional in the case, nothing to call for the application of this section intended for unusual and exceptional cases.

3. If the principal witness for the state tells the truth the defendant is plainly guilty of murder; and even the defendant's

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own story makes him grievously to blame. Considering that the jury had a right to believe that the prisoner and his party sought out the deceased with intent to quarrel with him, and considering that with two to one, and perhaps three to one against him, it is not probable that the deceased would have been the aggressor, we are not surprised that the jury gave credence to the story of the negro rather than to the other versions of the affair. This is a sad case of idleness and crime, and turns solely upon the credibility of the witness, and as the jury have evidently believed the story of the one who saw it all, and who tells his story with no motive to untruth, rather than the story of the others, who are more or less mixed up with the crime themselves, we feel it to be our duty to affirm the judgment refusing a new trial.

Judgment affirmed.

SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, *vs.*
LOU BENTLY, defendant in error.

Where a railroad company retains the trunk of a passenger under its lien for her fare, it is liable for any articles that may be taken therefrom whilst in its possession.

Certiorari. Railroads. Lien. Before Judge STROZER.
Dougherty county. At Chambers. October 3d, 1873.

For the facts of this case, see the decision.

VASON & DAVIS; LYON & JACKSON, for plaintiff in error.

SMITH & JONES, for defendant.

WARNER, Chief Justice.

In September, 1872, the plaintiff was at Macon, and desired to go to Albany on the defendant's road as a passenger, but did not have the money to pay her fare, which fact she

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communicated to the conductor of defendant's passenger train, and proposed to pawn her trunk for it. He consented for her to do so, and received her as a passenger on board of defendant's cars, with her trunk, to be carried to Albany. On her arrival at Albany, the conductor of defendant's train of cars retained her trunk for the payment of her fare from Macon to Albany, and placed it in defendant's baggage room at its depot, with the understanding that as soon as she paid her fare she was to have her trunk. When the defendant's conductor took the trunk into his possession at Albany, it was locked. Some time afterwards she paid the money due for her fare from Macon to Albany and got her trunk, and then discovered it was unlocked and several articles which she had therein were missing, of the aggregate value of \$38 20.

Suit having been instituted therefor, on the trial of the case before the justice, after hearing the evidence on both sides, he gave judgment in favor of the plaintiff for the value of the goods which had been taken from the trunk whilst in defendant's possession. Application was made to the judge of the superior court for a writ of *certiorari*, which was refused, and the defendant excepted.

The defendant had a lien by law on the plaintiff's trunk, as her baggage, for her fare as a passenger from Macon to Albany over its road: Code, section 2079. If the defendant had taken possession of the plaintiff's trunk on her arrival at Albany, and retained possession of it, claiming a lien thereon for her fare as a passenger, and the loss had occurred whilst the trunk was in its possession for that purpose, the defendant would have been liable for such loss, and the fact that the plaintiff consented that the defendant should have the lien on her baggage for her fare which the law gave to it does not alter or change the defendant's liability for the loss which occurred whilst the trunk was in its possession, and held as a lien for her fare. In the one case, it would have retained the possession of the plaintiff's trunk under its legal lien for her fare *without* her consent. In the other, it retained the possession of her trunk as a lien for her fare *with* her consent.

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Whether the defendant retained the plaintiff's trunk in its possession after her arrival at Albany, under its lien for her fare, with or without her consent, it was liable for the loss which occurred whilst in its possession, claiming a lien thereon for her fare, due to it as a passenger who had been transported over its road.

Let the judgment of the court below be affirmed.

**CALVIN E. JOHNSTON, plaintiff in error, *vs.* PETER PREER,
defendant in error.**

A bill in equity filed by A against B, alleging that A, B, C and D, having been partners in trade, did, in 1860, dissolve the partnership, have a full settlement and divide the assets: that in the division a mistake was made against A, by which the other three partners got of the assets \$8,211 00 which properly belonged to A, and then praying that B be made to account for the one-fourth of said assets thus received by him, is demurrable because the other partners are not joined.

**Equity. Parties. Partnership. Before Judge JAMES JOHN-
SON. Muscogee Superior Court. November Term, 1873.**

Johnston filed his bill against Preer, making, in substance, the following case:

On April 1st, 1856, complainant, James K. Redd, William Redd, Jr., and defendant, formed a partnership under the name of Redd, Preer & Company, for the purpose of doing a general grocery and commission businss in the city of Columbus. They were equal partners. William Redd, Jr., kept the books. They dissolved, and had a final division of the assets of the firm on April 1st, 1860. By the balance sheet then presented by the book-keeper complainant was entitled to receive \$8,172 48. In this calculation, as complainant has since discovered, there was a mistake of \$3,211 84 against him. He at once notified said partners and each one promptly admitted the error, and promised to pay to him one-fourth of the amount last aforesaid. But on or about the 1st of Au-

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gust, 1873, the defendant notified him that he would not pay to him his proportion. Wherefore complainant files this bill praying a correction of said mistake, and that the defendant be decreed to pay to him one-fourth of the sum last aforesaid, to-wit : \$802 96.

Upon demurrer filed, said bill was dismissed for want of proper parties. To which ruling complainant excepted.

INGRAM & CRAWFORD, for plaintiff in error.

PEABODY & BRANNON, for defendant.

McCAY, Judge.

Were the allegations here to the effect that the assets divided were cash, and the mistake against the complainant a cash item, I am not clear that the bill against one of the partners would not be good, though in this case, perhaps, an action at law would be the proper remedy, since the case might be considered a simple case of an action to recover back money received under a mistake of fact. But it appears that the thing divided was assets, and it does not appear that the mistake made against plaintiff was a cash item. If the things divided were goods, notes or debts, it would be unfair to unsettle the adjustment made at the time without an inquiry into the value and results of what each got. To do this all should be parties, so that equity and justice may be done to all.

Judgment affirmed.

BENJAMIN W. HEARD, plaintiff in error *vs.* WILLIAM R. CALLAWAY, defendant in error.

1. It does not necessarily follow because the sheriff would be liable under the law in an action on the case against him, that he would be liable to an attachment for contempt of court. The latter proceeding would depend on the good faith of his conduct in view of the circumstances under which he acted, of which the court is to judge.

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2. The question made by the affidavit of illegality being one of doubt and difficulty for even judicial officers to decide, it was not error in the court to decline to render a rule absolute against the sheriff for refusing to disregard it.

Sheriff. Contempt. Rule against officer. Before Judge POTTLE. Wilkes Superior Court. November Adjourned Term, 1873.

For the facts of this case, see the decision.

W. G. JOHNSON, for plaintiff in error.

W. M. & M. P. REESE, for defendant.

WARNER, Chief Justice.

The plaintiff obtained a rule against the sheriff of Wilkes county calling upon him to show cause why he should not pay to the plaintiff the amount of two executions issued on two judgments against Worthen, the defendant therein, one of which was obtained in 1860, the other in 1867. The sheriff made his return to the rule, in writing, which was sworn to, and not traversed by the plaintiff. The court, after hearing and considering the sheriff's answer to the rule, discharged the same. Whereupon the plaintiff excepted.

1. It appears from the sheriff's answer that he levied the executions on the land of the defendant, and advertised the same for sale on the first Tuesday in November, 1873, and was proceeding to sell the same when he was served with an affidavit of illegality made by the defendant, in which he alleged that the two executions were proceeding illegally against him, because the defendant was, on the 24th of October, 1873, adjudged a bankrupt, and that the land levied on was all the realty owned by defendant, and was worth less than the exemption of realty allowed him by the amendatory act of Congress, and that all of said land had been included in his schedule returned to the bankrupt court. The sheriff also stated in his answer that the land levied on had been set apart as a homestead by the ordinary, in 1870, for the bene-

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fit of the defendant's wife and children, as provided by the constitution and laws of this state; that the whole matter was surrounded with difficulties and could not be properly solved by him without the adjudication of the court, to which he returned the proceedings to be decided by the court; that he desired to do his duty, and in all his conduct acted with the utmost good faith. It also appears from the record in the case, that the plaintiff contested the defendant's right to a homestead before the ordinary, and took an appeal from his decision, allowing it to go to the superior court, and whilst pending there, it was by *consent* withdrawn, and the approval of the ordinary allowing the homestead confirmed. The main controlling question in this case is whether the court erred in refusing to make the rule absolute against the sheriff as being in contempt of the court, in failing to make the money due the plaintiff on the executions placed in his hands, on the statement of facts disclosed by the sheriff in his answer. The defendant had obtained a homestead exemption of the land levied on which was not worth more than the exemption allowed by the laws of this state in 1871. The defendant had been adjudged a bankrupt, and by the act of congress of 1873, he was entitled to the same exemption as allowed by the laws of this state in 1871. It is true the exemption had not been formally awarded to the defendant by the judgment of the bankrupt court at the time the sheriff suspended the sale of the land, when the affidavit of illegality was served on him.

Did the sheriff, by suspending the sale of the land and returning the affidavit of illegality to the court for its judgment, under the statement of facts disclosed in his answer, subject himself to be attached for contempt of court in failing to execute the process of the court? By the 3949th section of the Code it is declared that the sheriffs of this state shall be liable to an action on the case, or an attachment for contempt of court, at the option of the party, whenever it appears that such sheriffs have injured such party, either by a false return or by neglecting to arrest a defendant, or to levy

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on the property of the defendant, or to pay over to the plaintiff or his attorney any moneys collected by such sheriff by virtue of any *fi. fa.* or other legal process, or to make proper return of any writ, execution, or other process put into the hands of such sheriff. The 3954th section provides, that when the officer is called only by rule *nisi*, he shall fully respond in writing to said rule, under oath, and if the answer is not denied, the rule shall be discharged or made absolute, according as the court may deem the answer sufficient or not, the movant having the right to traverse the truth of such answer. Whether the sheriff would have been liable to the plaintiff in an action on the case under the law, is not the question now before us, but the question here is, whether the court erred in discharging the rule against the sheriff for *contempt of court* on the uncontroverted facts stated in his answer. It does not necessarily follow because the sheriff would be liable under the law in an action on the case against him, that he would be liable to an attachment for contempt of court. The latter proceeding would depend on the good faith of his conduct, in view of the circumstances under which he acted, of which the court is to judge. In the former case, if he is liable under the law, in other words, if the law will not protect him from liability to the plaintiff when sued for neglect of duty, then the court would be bound to administer the law applicable to the facts of the case, although the sheriff might have acted with entire good faith. In the one case, the court may exercise its discretion whether it will attach him for contempt of court or not. In the other, it would have no discretion but to administer the law applicable to the rights of the parties as shown by the evidence in the case, and render its judgment in accordance therewith.

2. Whether the defendant was entitled to his exemption of the land levied on in the bankrupt court, as alleged in the defendant's affidavit of illegality, was a question of doubt and difficulty for even judicial officers to decide, much more was it so for the sheriff, who is a mere ministerial officer, and we cannot say that he was liable to be attached for contempt of

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court in suspending the sale of the land when the affidavit of illegality was served upon him, and returning the proceedings to the court for its judgment thereon. Speaking for myself alone, I am not willing to say that the federal congress has the power to pass a law retroactive in its terms, which will deprive the judgment creditor of his vested right to collect his debt out of the property of his judgment debtor, owned by him at the time of the rendition of his judgment, and vest it in the judgment debtor as a homestead; not because the federal congress has not the power under the constitution to impair the obligation of contracts in the enactment of uniform laws on the subject of bankruptcies, but because it is contrary to reason and justice, and to the fundamental principles of the social compact, to take one man's property and give it to another without compensation. That is a power which neither the state legislature nor the federal congress can properly exercise, in my judgment, and until the supreme court of the United States shall so decide, I should be unwilling to so hold.

Let the judgment of the court below be affirmed.

**NORTH AND SOUTH RAILROAD COMPANY, plaintiff in error,
vs. R. M. WINFREE, defendant in error.**

An instrument in the following form, *to-wit*: "July 8, 1871, I hereby subscribe for one share of the capital stock of the North and South Railroad Company of Georgia, and hereby own and acknowledge myself indebted to said company in the sum of \$100 00, payable to the order of said company on demand; provided the same is not to be paid, or any part thereof, until said road is graded from Columbus, Georgia, within one mile of the court-house in Hamilton, Georgia, within one year from date," is an agreement to pay to the company \$100 00 on demand, after the prescribed conditions are fulfilled, and not an agreement to pay what may be the market value of a share of the stock.

Railroads. Stock. Contracts. Promissory notes. Before Judge JAMES JOHNSON. Harris Superior Court. October Term, 1873.

North and South Railroad Company *vs.* Winfree.

The North and South Railroad Company brought assump-
sit against R. M. Winfree on the following instrument:

"\$100 00.

HARRIS COUNTY, GEORGIA,

"July 8th, 1871.

"I hereby subscribe for one share of the capital stock of
the North and South Railroad Company of Georgia, and
hereby own and acknowledge myself indebted to said com-
pany in the sum of \$100 00 therefor, payable to the order of
said company on demand; provided the same is not to be paid,
or any part thereof, until said road is graded from Columbus,
Georgia, within one mile of the court-house in Hamilton,
Georgia, within one year from date.

(Signed)

"R. M. WINFREE."

The plaintiff introduced the contract sued on, and showed
a compliance on his part with the terms therein expressed.

The defendant introduced testimony to show that the plain-
tiff's stock was only worth fifty cents in the dollar. To this
evidence plaintiff objected. The objection was overruled, and
plaintiff excepted.

The court charged the jury that the measure of damages
was the difference between the nominal value of the stock,
and the actual cash value of the same at the time of the
breach of the contract. To this charge plaintiff excepted.

The jury returned a verdict for \$50 00, with interest and
costs of suit. Error is assigned upon each of the above
grounds of exception.

CHARLES H. WILLIAMS, by R. J. MOSES, for plaintiff in
error.

No appearance for defendant.

MCCAY, Judge.

It seems very clear to us that the contract sued on is a con-
tract to pay \$100 00 on demand, if the road is completed to
Hamilton within a year. The value of the stock has nothing

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to do with it. One share of the stock is the consideration for the promise, and if it was at the time of the contract worth anything, so that the contract is not a *nudum pactum*, the plaintiff has a right to stand on the written agreement. If the stock has proven worthless, that was the defendant's risk ; he was one of the stockholders, and may be himself partly the cause. At any rate, he has agreed to pay \$100 00, and we see nothing in his contract to alter this, except the condition he himself imposed, which, as the proof shows, has been complied with.

Judgment reversed.

L. M. RHODES, plaintiff in error, *vs.* SAMUEL HART, defendant in error.

1. Where a note was given to the plaintiff, indorsed by the defendant, for money borrowed by the maker thereof, and subsequently said note was given up, a new note by the maker for a larger amount, including said indebtedness, being substituted therefor, and suit is brought against the defendant for the amount originally loaned, as money had and received for the use of the plaintiff, and the defendant claims to be discharged from all liability therefor by the delivering up of the first note, the court should have charged the jury that if they believed from the evidence that the original note was given up, the defendant's name erased therefrom, and a new note given by the maker, including the amount due on the original note, secured by mortgage on the maker's property, the liability of the defendant as indorser on the original note, was at an end.
2. The plaintiff, having taken a mortgage from the maker of said note on one-fourth of the crop, to secure its payment, is estopped from claiming the said one-fourth from the defendant.
3. Where the jury pass upon questions not put in issue by the pleadings, their verdict is illegal and will be set aside.

Promissory notes. Indorsement. Estoppel. Verdict. New trial. Before Judge GIBSON. Warren Superior Court. April Term, 1873.

For the facts of this case, see the decision.

CHARLES S. DUBOSE, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant, alleging that on the first day of January, 1867, the defendant was indebted to him \$300 00, besides interest, for so much money had and received from the plaintiff for the use of defendant. There is also another count in the plaintiff's declaration, alleging that the defendant is indebted to him in one other sum of \$300 00, for that the defendant promised to pay him for the use of said money the one-fourth of the crop made on a certain described tract of land sold by defendant to one Moses Reese. In support of these allegations, it appears from the evidence in the record that in the year 1867 Reese came to the plaintiff to borrow \$300 00; that he loaned the money to the defendant, as he says, and took the note of Reese for \$375 00, which was indorsed by the defendant, secured by a lien on Reese's cotton crop. When the note became due defendant notified the plaintiff to foreclose his lien on Reese's crop, which was done, and an execution levied thereon. After the levy was made Reese and the plaintiff entered into an agreement by which the \$375 00 note, indorsed by the defendant, was given up by the plaintiff to Reese, the levy dismissed, a new note given by Reese for \$417 50, which included the \$375 00 note and other debts due by Reese to the plaintiff, which note of \$417 50 was secured by a mortgage on Reese's land, stock, and one-fourth part of the crop to be made on the land by Cason for the year 1869. The plaintiff states that he then agreed with defendant to take the rent of the land that he had sold to Reese and taken back for the year 1869, which was rented to Cason. Plaintiff did not intend to release defendant from the note, did not scratch his name off, but delivered it up to them. The note was offered in evidence at the trial with defendant's name erased. Rhodes,

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the defendant, stated that he sold a lot of land to Reese, took his two notes, one for \$200 00, the other for \$600 00, and gave him his bond for title. Reese paid the \$200 00 note, but not the \$600 00 note, and defendant sued him on it. Defendant and Reese then agreed to rescind the land trade Reese agreeing, in writing, that if defendant would deliver up to him his \$600 00 note he would deliver up his bond for title to the land, and defendant agreed, by parol, that if Reese would at once give up the bond for title to him, that he would give him, Reese, the one-fourth of the crop grown on the land in 1869, which Reese refused to do, and still refuses to comply with his written agreement. Defendant never agreed to pay the plaintiff, Hart, one-fourth of the crop; did not know him in the transaction. There is much other evidence in the record, and in relation to the erasure of the name of the defendant as indorser on the \$300 00 note by the plaintiff, as well as to the agreement of the defendant to pay one-fourth of the rent of the land to the plaintiff, the evidence is conflicting. The jury found a verdict for the plaintiff for \$444 00, with interest from the 1st January, 1870, and recommended that the court order the bond for titles given by the defendant to Reese delivered up and canceled, in pursuance of the agreement made by the parties, and the note of Reese be delivered to him by Rhodes, the defendant. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and for error in the refusal of the court to charge the jury as requested, and because the verdict was illegal, which motion was overruled by the court, and the defendant excepted.

1. Reese borrowed of the plaintiff \$300 00 to pay a debt which he owed defendant, gave to him his note for \$375 00, which note was indorsed by defendant. Afterwards this note was given up and a new note given by Reese, as before stated. In view of the facts of this case the court, in our judgment, should have charged the jury that if they believed from the evidence that the original note for \$375 00 was given up and the defendant's name erased therefrom, and a new note given

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by Reese, including the amount due on the original note, secured by mortgage on Reese's property, the liability of the defendant as indorser on that original note was at an end.

2. In relation to the one-fourth of the crop made on the land, it would seem that if the plaintiff took a mortgage from Reese on the one-fourth of the crop to secure the payment of the last note, he would be estopped from claiming it from Rhodes, the defendant.

3: The verdict is for too much, even if the defendant was liable to pay one-fourth of the rent of the land, besides, it is illegal, as the jury passed upon questions not put in issue by the pleadings.

Let the judgment of the court below be reversed.

ELIZABETH EMORY, executrix, plaintiff in error, vs. JAMES G. SMITH, for use, etc., defendant in error.

If an execution issue in accordance with the judgment in a case, it is not a good ground for an affidavit of illegality to stay the execution that the judgment is irregular.

Judgment. Execution. Illegality. Before Judge JAMES JOHNSON. Harris Superior Court. October Term, 1873.

James G. Smith, for the use of Edwin M. Hines, brought complaint against "Elizabeth Emory, executrix of Samuel Emory, deceased," on five promissory notes dated March 12th, 1861, due December 25th, next thereafter, payable to plaintiff bearer, and each for the sum of \$50 00. Judgment by default in the usual form was rendered in favor of "the plaintiff" against the "defendant." Execution issued to be levied "of the goods and chattles, lands and tenements of Elizabeth Emory, executrix of Samuel Emory, deceased." A levy was made upon certain lands as the property of the deceased.

The defendant filed an affidavit of illegality, setting up the following grounds:

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1st. Because in the original suit upon which this *f. fa.* was obtained, the defendant was sued in her representative character, to which there was no plea of *ne unques executrix*, or release to herself, or *plene administravit præter* and a finding against her, and therefore the judgment should have been *de bonis testatoris*, and the execution in accordance therewith.

2d. Because if said judgment and execution are illegal, she has a valid defense to the original suit, of which she was not aware until after said judgment was obtained.

Upon demurrer filed the affidavit of illegality was dismissed. To which ruling defendant excepted.

JAMES M. MOBLEY; R. A. RUSSELL, by JAMES M. RUSSELL, for plaintiff in error.

L. L. STANFORD, for defendant. •

McCAY, Judge.

Under the uniform rulings in this state, an *illegality* does not lie on the ground that there is error in the judgment. Not, at least, unless the judgment be void. Here the most that can be said is that the judgment was irregular. Such a judgment was possible under our law, under the writ. There was no error therefore in overruling the illegality. This proceeding is a statutory one, and only in special cases, to-wit: when the *execution is proceeding* illegally. If it conforms to the judgment it is not proceeding illegally, except, perhaps, when the judgment is absolutely void. We do not say the party has no remedy. If the facts are true, as stated, this can hardly be so. We leave this, however, to the party's own discretion.

Judgment affirmed.

Mayer & Lowenstein vs. The Chattahoochee National Bank.

MAYER & LOWENSTEIN, plaintiffs in error, vs. THE CHATTAHOOCHEE NATIONAL BANK, defendant in error.

1. Under the act of 1869, a garnishee must answer not only what he was indebted, etc., at the date of the summons of garnishment, but also "what he has become indebted to the defendant, or what property or effects of his he has received or got possession of, belonging to the defendant, between the time of the service and the answer;" and under this rule, if a bank, under summons of garnishment, receives deposits of the defendant, and pays them to his checks, it is liable to the garnishing creditor for the amount deposited up to the time of the filing of the answer
2. When A deposits money in a bank, with directions that it is to be paid out to a check which he has given, or will give, to C, the money is still the money of A until the bank either pays it, or promises C to pay it, or unless it be deposited at the instance or procurement of C, or under an arrangement with him.

Garnishment. Banks. Deposit. Check. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Mayer & Lowenstein brought complaint against McKee Brothers for \$375 26, balance due on a promissory note, dated May 3d, 1867, with interest from September 6th, 1867. Pending suit, to-wit: on March 11th, 1869, process of garnishment was served on the Chattahoochee National Bank. Judgment was obtained at the November term, 1870, on the original cause of action against the defendants. On December 5th, 1873, the garnishee answered, admitting an indebtedness to John G. McKee, a member of the firm of McKee Brothers, at the time of the service of garnishment, of \$8 47, which sum, together with \$2 48 interest, it paid into court. This answer was traversed. Upon the trial of the issue thus formed, the evidence made, in substance, the following case:

On March 11th, 1869, the date of the service of process of garnishment, the books of the bank showed to the credit of John G. McKee \$8 47. Subsequent to said service there were divers others credits amounting to \$305 51. These various deposits were made to meet checks which he had

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drawn against the same. The bank subsequently paid said checks. As each deposit was made McKee would state that it was for the purpose of meeting some check which he had drawn. The account was kept in this manner merely as a "memorandum."

The court charged the jury, "that if the evidence in this case showed that these several amounts, appearing to the credit of McKee, since the service of said summons of garnishment, had been deposited by him under an agreement that they were to pay certain checks drawn against said deposits, and if the bank had so paid out said amounts to the parties holding said checks, it was only liable for the \$8 47, with the interest, admitted to be due."

The jury returned a verdict for the plaintiffs for \$8 47, with interest from March 11th, 1869.

Plaintiffs excepted to said charge, and now assign the same as error.

HENRY L. BENNING ; G. E. THOMAS, for plaintiffs in error.

INGRAM & CRAWFORD ; R. J. MOSES, for defendant.

McCAY, Judge.

1. The act of 1869 is very broad. The garnishee is to answer not only what he was indebted at the time of the service of the summons, but what he has become indebted to the defendant, and what effects he has received or got possession of, of his, between the date of the summons and the answer. A bank which receives a deposit from a debtor clearly becomes indebted to him if it is a general deposit, and has effects of his if it be a special one, and under the express words of the statute, the summons acts upon and stops it, and any payment to the debtor, or to his order, is at the risk of the bank. This may be very inconvenient, and we can well see how such a law may often work hardly, and be an injurious restriction on the dealings of men who owe debts. But the law-making

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power has seen fit to declare its will in the matter, and it is not for the courts to alter it.

2. The only question there can be in this case is whether these deposits, made, as each was, for a special purpose, and under an express agreement between the debtor and the bank that they were made and received to pay certain specified checks which the debtor had drawn or would draw, continued the property of the debtor. The case in 15 *Georgia Reports*, of *Pace vs. The Trustees of Howard College*, 486, it seems to us, settles this question. It was there held that the deposit continued the property of the depositor until the bailee paid, or promised the person for whose use it was deposited to pay it. And this is undoubtedly the general rule: *Owen vs. Bowen*, 4 C. & P., 93, 96; *Cobb vs. Beeke*, 6 Q. B., 930; *Surtees vs. Hubbard*, 4 Esp., 203; *Wharton vs. Walker*, 4 B. & C., 163. The exceptions to the rule are special cases, as where the person to whom the money is ordered to be paid is interested in the consideration, or has himself procured, or directed, or agreed, that the deposit shall be made for his benefit. In such cases the depositor may be considered only as the agent of the party at interest in making the deposit and in contracting with the bailee for its delivery or payment to the true owner or beneficiary, and he, the depositor, loses control over it immediately on the deposit. In fact it is not his deposit at all, but left for the true owner by him as agent: *Lampleigh vs. Braithwhite*, 1 Smith's L. C., 67; *Hut.*, 105; *Townsend vs. Hunt*, Cro. Car., 408; 11 Ad. & E., 452; *Curtis vs. Collingwood*, 1 Vent., 297; *Martin vs. Hind, Cowper*, 437; 3 B. & C., 462; 5 Dow. & Ry., 319; 4 B. & C., 664. See *Addison on Contracts*, page 941, where this subject is fully discussed and the authorities cited. There is no proof in this record going to show what were the relations of the checkholder to this deposit, except that the depositor declared at the time of making the deposit that the money was to be paid to the check. Whether the person to whose benefit it was deposited directed it to be done, or procured, or agreed that it should be done, or was in any way interested in the

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consideration, does not appear. As the case stands it is simply a case of a deposit of money by A, to be paid to his own order or to some third person, and is within the rule laid down in 15 *Georgia*. As soon as the deposit was made the bank became the debtor of the defendant, and the summons of garnishment operated upon it. In the case of Pace it was declared that if the depositor paid or promised the usee to pay before revocation, the property of the depositor would be divested. In the present case the question must turn on the nature of the deposit at the time it was made, and whether, at that time, the property was in the depositor, since, if it was his then, the garnishment immediately covered it. As we have said, that depends on whether the third person was interested in the consideration, or procured, or directed, or agreed that the deposit should be made to his use. In that case the depositor, in making the deposit, might fairly be said to be acting, not for himself, but for the checkholder. The entries in the book, by which it appears that the deposit was made to the credit of the depositor, would seem to militate against this; but that is only one mode of arriving at the truth, and may be rebutted by proof of the real truth of the case. As it is, we feel constrained to reverse the judgment.

Judgment reversed.

HOWARD & SOULE, plaintiffs in error, vs. DAVID H. REID
et al., defendants in error.

1. The person to whom the license to peddle is required to be granted, is he who travels and vends the goods and wares, and it is against such person that the process is to be issued, under section 536, Code, when he peddles without license.
2. A process issued under said section against A and B, on the ground, that as partners, they did, on, etc., in the county, etc., "by their agent, peddle articles, etc., without having obtained license authorizing them to do so," etc., is, upon its face, illegal and void.

Peddlers. License. County matters. Before Judge BARTLETT. Putnam Superior Court. September Term, 1873.

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Howard & Soule instituted suit against David H. Reid and James L. Wilson, for a horse, wagon and harness, and two sewing machines. The declaration contained two counts, one in trespass and the other in trover. The damages were laid at \$2,000 00. The record fails to disclose any plea by the defendants.

The evidence showed that the property in controversy was sold under the following process :

"GEORGIA—PUTNAM COUNTY.

"To all and singular the sheriffs and constables of said state—Greeting:

"Whereas, it is known to me, of my own knowledge, that A. B. Howard and W. A. Soule, partners under the name of Howard & Soule, did, on the 15th day of December, 1871, and for four months after said date, in the county and state aforesaid, by their agent, peddle articles not manufactured in said state, to-wit : sewing machines, without first having obtained license authorizing them so to do, and no action having been taken by the ordinary of said county regulating peddling in said county, and the said Howard & Soule not being disabled soldiers of said state :

"These are, therefore, to authorize and command you, to levy on and seize a sufficiency of the property, real and personal, of the defendants, to make the sum of \$200 00, the amount of the forfeit, according to the statute in such cases made and provided, and a sufficiency to pay the cost of this proceeding, and that you, after due advertisement, expose said property to public sale, as the law directs, and have you the said sum of money at the court of ordinary for said county, on the first Monday in August next, and have you also this writ, with your actings and doings entered thereon.

"Witness my hand and official seal, this 3d day of June, 1872. (Signed) "D. H. REID, ordinary."

That the property was levied on about June 15th, 1872, and sold on the 6th of August of the same year. That the-

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horse was worth \$100 00, the wagon \$150 00, the harness \$25 00, and the sewing machines \$95 00 each; that the value of the horse, wagon and harness, for hire, was \$5 00 per day, and the sewing machines \$20 00 per month each. That the plaintiffs had been engaged for about three years in selling Wheeler & Wilson's sewing machines in the state of Tennessee, and a part of the state of Georgia. That the plaintiffs are citizens of the state of Tennessee. That the machines were manufactured in the state of Connecticut. That one R. H. Neal, as the agent of the plaintiffs, had been vending said machines in Putnam county, Georgia. That David H. Reid, the ordinary aforesaid, ordered the seizure of said property, and James L. Wilson, the sheriff of said county, levied on and sold the same.

The jury found for the defendants. The plaintiffs moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled and plaintiffs excepted.

L. E. BLECKLEY, for plaintiffs in error.

REESE & REESE; W. F. JENKINS, for defendants.

TRIPPE, Judge.

1. We are satisfied from a thorough examination of the provisions of the Code on the subject of peddling, that the person to whom the license to peddle is required to be granted is he who travels and vends the goods and wares, and that it is against such person that the process is to be issued, under section 535 of the Code, when he peddles without license. Section 1634 provides that the peddler shall furnish the ordinary with evidence of *his good character*, and shall take and subscribe before him this oath: "I swear that I will use this license in no other county than the one for which it is granted, nor suffer any person to use it in my name, and that I am a citizen of this state, etc. * * * and the license must contain a description of the person of the peddler." The two pro-

visions requiring the peddler to furnish evidence of his character and a description of his person, plainly show that the license must be to him who does the peddling, the act of traveling and selling, and not to another person, a merchant or firm of merchants, who may do the peddling through an agent, by virtue of a license granted to them. We can see many good reasons for such requisitions, and the provisions quoted plainly mean this. Section 533 is, if any person, except a disabled soldier of this state, peddles without first obtaining license, etc., he forfeits to the county \$100 00 for the first act of peddling, and for each month thereafter \$25 00; and then section 536 declares that the ordinary may issue process against such person. Now, against whom is the process to issue? Surely against him who should obtain the license, and who peddles without it. It cannot go against A by simply alleging that B peddled for A, and that A had no license, or that A peddled by his agent without first having obtained a license. If the license is to issue to the peddler, and if the process is to be against him who peddles without a license, then it must be against the person who does the act of peddling. If it be objected to this construction that responsible parties may violate the law with impunity, and that there could be no vindication of it when thus violated by or through an irresponsible or insolvent agent, the reply is, that two means are provided whereby it may be done. The latter clause of section 536 enacts that in default of enough property being found to pay the penalty, the defendant shall be arrested and safely kept, as in cases of persons under *ca. sa.* Indeed, the requisition of the statute is that the process is so to issue. Even if this provision be not now operative, on the ground that the *ca. sa.* law is not now of force, which we do not determine, there is a still heavier penal provision.

By section 4598 peddling without license is declared to be a misdemeanor, and punishable as other misdemeanors by a fine not exceeding \$1,000 00, imprisonment, or work in a chain-gang, or any one or more of these as may be ordered in the discretion of the judge. It would hardly be claimed that

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the plaintiffs in error who reside in the state of Tennessee could be indicted under this section, demanded by the governor, and punished in any county of this state, where it was charged that they had peddled by an agent, without first having obtained a license. If the one provision of the law could not thus be enforced, how can the other? Whether the legislature may not provide that the process specified in section 536 might issue against one who thus procures another to peddle for him, so far as to make the horse and wagon and goods, furnished to the one who does the peddling liable to it, we do not say. Sufficient is it that there is no such enactment, and such laws are not to be enlarged by construction.

2. This process having been issued against the plaintiffs on the ground that, as partners, they did, by their agent, peddle without having obtained license authorizing them to do so, was illegally issued, and being without authority of law was void upon its face. A new trial is therefore granted.

Judgment reversed.

**WILLOUGHBY JORDAN *et al.*, plaintiff in error, vs. SINTHA
A. FOUNTAIN, defendant in error.**

Where A gave a promissory note to B for a sum certain, due at a fixed time, as part consideration for a parcel of land, conditioned, however, that before it was to be paid B should take up a note given by him to C, on the purchase of the same land:

Held, that B might recover on A's note, on proof that his (B's) note to C was barred by the statute of limitations.

Promissory notes. Statute of limitations. Before Judge KIDDOO. Randolph Superior Court. May Term, 1873.

Sintha A. Fountain brought complaint against Willoughby Jordan and O. H. Jordan, on the following note:

"By the first day of January, 1871, we promise to pay Sintha A. Fountain or bearer, three hundred and fifty dollars,

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as the balance due on lot of land number 170, being in the 5th district of Randolph county, land bound for the payment of this note, with the condition that said Sintha A. Fountain is to take up and pay off, or cause to be paid off, a note given to Manning G. Stamper for two hundred and twenty-eight dollars, payable the first day of January, 1865, and dated 7th day of February, 1863, this above Stamper note to be paid off out of this note, it being given to said Stamper as a part of the purchase money for said land, and this note is subject to the payment of the Stamper note, this the 13th day of October, 1869, or becomes void.

(Signed).

"WILLOUGHBY JORDAN,
"O. H. JORDAN."

On this note were various credits, amounting in the aggregate to \$200 00.

The defendant pleaded that the plaintiff had not complied with the condition embraced in said note, in this, that she had not paid off her note to Stamper.

The evidence is unnecessary to an understanding of the decision.

The defendants requested the court to charge that the plaintiff could not recover until she showed a compliance with the condition expressed in the contract sued on in reference to the payment of the Stamper note. The court refused said request, and charged, in substance, that if said note to Stamper was given and became due prior to June 1st, 1865, and had not been sued prior to January 1st, 1870, it was barred by the statute of limitations, and the plaintiff having been discharged from liability thereon by operation of law, could recover from the defendants.

The jury found for the plaintiff. The defendants moved for a new trial, because of said refusal to charge and of the charge as given. The motion was overruled, and defendants excepted.

WEST HARRIS; JAMES T. FLEWELLEN, by A. HOOD, for plaintiffs in error.

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WORRILL & CHASTAIN, for defendant.

McCAY, Judge.

We see no error in ruling out the deed or bond. As they stood they were simply papers purporting to be duly signed by the parties making them, and could not go in evidence without proof of their execution, under the rules in such cases. We think the court was right, both in his charge and refusal to charge. Under the circumstances, with nothing more, perhaps the payment of the Stamper note was a condition precedent, and even if it were not, as the evidence is plain that the Stamper note was for the purchase money, and the defendants had notice that it was unpaid, they might defend the note now sued on until it was paid or discharged. But under the facts as they stood before the jury, this was immaterial. The Stamper note was barred by the act of 1869; it was as though it was paid; the law presumes it paid; Stamper cannot sue upon it, and the defendants are in no danger from it. The object of the condition is fully attained; they are free from any liability to pay the note of Stamper, which was a lien on the land. This is all they have a right to ask, and the court was right in not complicating the case with a charge of law which, though true, had no significance, as the case stood.

Judgment affirmed.

WILLIAM M. LANE, plaintiff in error, vs. JOHN W. CUNNINGHAM, guardian, defendant in error.

Where the discretion of the Court below is not abused in ordering a new trial this court will not interfere.

New trial. Before Judge ANDREWS. Oglethorpe Superior Court. October Term, 1872.

On April 28th, 1869, an execution in favor of William M. Lane against John W. Cunningham for \$126 44 principal,

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with interest and costs, based upon a judgment recovered at October term, 1862, of Oglethorpe superior court, was levied on a tract of land as the property of the defendant. A claim to the same was filed by Cunningham, as the guardian of Robert J. Fleeman.

Upon the trial, the evidence made the following case:

On September 7th, 1860, Cunningham conveyed the property in controversy to John M. Kidd. On June 5th, 1866, it was sold under an execution in favor of Cunningham against Kidd, to Joseph A. Childers. On the 3d of the following October, Cunningham, as guardian of Robert J. Fleeman, purchased the land from Childers for the sum of \$530 00, taking a deed to the same.

One James M. Wright testified that Cunningham told him in the year 1867, that the land in controversy belonged to him.

This evidence was objected to by claimant upon the ground that the declarations of Cunningham, in accordance with his interest, were inadmissible. The objection was overruled, and claimant excepted.

The evidence was voluminous. It is thought unnecessary to incorporate it here, as it does not tend to illustrate any principle of law enunciated in the decision. The plaintiff sought to show that though the legal title was in claimant, yet, in fact, the property belonged to Cunningham individually.

The jury found the property subject. The claimant moved for a new trial upon numerous grounds, and amongst them, because the court erred in admitting the aforesaid testimony of Wright, and because the verdict was contrary to the evidence. The court sustained the motion upon both grounds, holding that the testimony of Wright was improperly admitted, for the reason that the declarations of Cunningham were inadmissible to bind his ward, who was the real party at interest.

To this decision ordering a new trial, plaintiff excepted.

JOHN C. REED, by SAMUEL LUMPKIN, for plaintiff in error.

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J. D. MATTHEWS, for defendant.

WARNER, Chief Justice.

This was a claim case, and on the trial thereof the jury found the property subject to the execution levied thereon. A motion was made for a new trial on the several grounds set forth in the record, which was granted by the court on the ground of error in admitting the evidence of Wright, and because the verdict was strongly and decidedly against the weight of the evidence. In looking through the evidence in the record, and considering the alleged error in admitting Wright's testimony, we find no error in granting the new trial in this case.

Let the judgment of the court below be affirmed.

SMITH & ONEAL, plaintiffs in error, *vs.* FRANCIS A. FROST,
defendant in error.

(TRIPPE, J., did not preside in this case on account of relationship to one of the parties.)

1. Where cotton was stored with the defendants as warehousemen, and the houses containing the same were seized by the military authorities of the Confederate States, to be used as hospitals, and the cotton thrown into the streets, where it was seen by one of the defendants, and the facts show a strong probability that it was also seen by the plaintiff, and the court charged the jury that though the cotton had been thrown out of the defendants' house by the *vis major*, yet if the defendants could, by the exercise of ordinary care, have recaptured and taken care of it, they were liable, and that the measure of damages was the value of the cotton at the time of the demand:

Held, that under the facts this was error. The judge should have qualified this charge by adding, unless the plaintiff knew, or had good reason to believe that his cotton or a portion of it was thrown out by the military authorities, in which case, if he could have saved it by the exercise of ordinary care, the defendants would not be liable, and that the jury, in determining the question of ordinary care, were to take into consideration the situation of the defendants and their ability or want of ability, to exercise ordinary care in the matter.

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2. If the defendants abandoned the care of the cotton when it was thrown out of their buildings and were guilty of want of ordinary care in not retaking it, the measure of damages is the value of the cotton at the time of the abandonment and not at the time of the demand.

Warehousemen. Damages. Before Judge BUCHANAN.
Troup Superior Court. November Term, 1872.

Smith & O'Neal had, in 1861, 1862 and 1863, taken in store, as warehousemen, various lots of cotton for Frost, the plaintiff below. In 1865, after the war, Frost demanded the cotton. It then appeared that from eighteen to twenty-eight bales were missing, and suit was brought against the defendants as warehousemen, for a breach of duty in failing to keep safely the plaintiff's cotton.

The defendants set up that a considerable portion of defendants' cotton was stored, with his knowledge, in certain houses and stables, distant from the warehouse, which defendants had rented for the purpose after theirs was filled. The evidence showed that their houses were seized by the Confederate military authorities shortly after the battle of Chickamauga, to be used as hospitals; that the cotton was thrown out in the streets; that after some time, the town authorities had removed it to a shelter over which defendants had no control. The evidence further showed that, at the time the cotton was thus thrown out, the defendants and the plaintiff were in the Confederate army as soldiers; that they had all applied for leave to come home and see to this very matter of which they had heard; that the plaintiff did get leave, and came home, but both the defendants failed; that the plaintiff removed and took care of other cotton of his which had been thrown out of other houses. One of the defendants came home without leave and saw the cotton in the streets, but did not take any steps to take care of it.

The defendants stated on oath that the plaintiff knew some of his cotton was stored in the houses alluded to; that he had seen them storing there day by day, and that a portion of his cotton was received by them and receipted for at said houses,

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and that they had notified him, before he left the army to come home, that they would not be responsible for the cotton.

The plaintiff testified that he did not know any of his cotton had been removed from the warehouse to these houses, but he did not affirmatively deny either his knowledge that a portion of his cotton was stored in those houses, or that defendants had notified him that they would not be responsible for it.

The court charged the jury, amongst other things, as follows:

"If you believe from the evidence that the cotton, by an irresistible power, was thrown out of the houses in which it was deposited, and that the defendants, by the use and exercise of ordinary diligence, could not repossess themselves of it, and secure and preserve it, the defendants are not liable. But if you believe from the evidence that the defendants, by the use and exercise of ordinary diligence, could have possessed themselves of the cotton and have secured and preserved it, then the defendants are liable for the value of the cotton at the time of the demand, if a demand therefor was made by the plaintiff."

To this charge the defendants excepted.

The jury found for the plaintiff \$4,000 00. The defendants moved for a new trial, on account of error in the above charge. The motion was overruled, and they excepted.

A. W. HAMMOND & SON, for plaintiffs in error.

1st. If this action was trover, the verdict should have been in the alternative: Code, secs. 3028, 3563, 3564.

2d. If it was not trover, demand was not pertinent to the cause, so far as fixing the measure of damages was concerned. Demand is only evidence of prior conversion: Brown's Actions at Law, 316, and authorities cited, viz.: Wilton *vs.* Gir-dlestone, (5 B. & A., 847;) 7 E. C. L. R., 460; 2 Modern R., 244.

3d. Conversion is the gist of the action. Value at date of conversion, and interest thereon, is measure of damages generally: Schley *vs.* Lyon *et al.*, 6 Ga. R., 535, (3.) Highest

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value between conversion and trial can be had only when defendant keeps the property: Dorsett *vs.* Frith, 25 Ga. R., 541, 543.

FERRELL & LONGLEY, for defendant.

McCAY, Judge.

Upon the question so elaborately argued in this case, as to the weight of the evidence, and whether the verdict is for the proper amount according to the testimony, we express no opinion, since, under our judgment, there is to be a new trial, on other grounds.

1. The charge does not do full justice to the defendant below, under the evidence. The general principle laid down by the judge as to the duty of the warehouseman to use ordinary care, even when his custody of goods is interfered with by a *vis major*, is right enough, and is supported by authority as well as by the principles of justice. But there is a large element in the evidence that the charge ignores. The condition of things as disclosed by the evidence is peculiar. Not only was the cotton turned into the street by the Confederate authorities, but the defendants themselves were under duress. This the plaintiff knew. He was at home, was cognizant of the seizure of this cotton at the time it was done, and if he knew this was his cotton, or by the exercise of such prudence as a man of ordinary prudence usually exercises about his affairs, might have known it was his cotton, and could have saved and protected it, we think he is legally and justly chargeable himself with the loss. It occurs to us that common justice would require the owner, under such circumstances, to interfere for his own protection. He has no right to see his property go to ruin, relying upon his remedy over against the warehouseman. Especially is this true if he knew, as he did, that the defendants were in the Confederate army and themselves under duress by a *vis major*. It seems to us that an owner of cotton, who, knowing that the warehousemen were thus situated, should see the cot-

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ton he had stored with them thus thrown into the street, has duties of his own to perform, and that if he neglected to perform them he has no remedy.

2. Nor do the facts of this case—as that one of the defendants was in the county—make this rule inapplicable. The circumstances of his presence were peculiar; he was absent without leave. We all know the position at that time of a man absent without leave from the army. He was constantly in danger of arrest. There was a constant scrutiny of papers by the enrolling officers and their underlings, so that even a sick or wounded soldier was compelled to be very particular to have his papers all right. And we think the judge, in charging the jury as to the liabilities of the defendant, if by ordinary care they could have saved the cotton, ought to have qualified his charge by letting the jury consider from the evidence whether the defendants were in such a situation as to be capable of exercising ordinary care. Duress by the *vis major* of the person, so as that he cannot exercise the ordinary care to save the goods, is just as much a *vis major* as a violent seizure of the goods.

Judgment reversed.

HENRY FERGUSON, plaintiff in error, *vs.* SOCRATES G. N. FERGUSON, executor, *et al.*, defendants in error.

1. A testator who died in 1868 bequeathed \$8,000 00 to his executor in trust for three of his grand-children. The bequest was to be "set aside as soon as the debts and expenses were paid." The balance of his estate was given to his son (the executor,) and to his daughter, Mrs. Flannegan. The grand-children filed their bill against the executor for their legacy, alleging that he and Mrs. Flannegan, after paying the debts, divided the land and negroes between them in November, 1868, and that such a division was a *devastavit* on the part of the executor. The bill did not waive discovery. The executor answered that the debts of the estate had not been paid at the time of the alleged division; that the creditors would not receive Confederate money; that he would not sell property to raise the \$8,000 00 for the grand-children in Con-

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erate money, and on account of the war and the condition of the country, he and his sister, the other residuary legatee, did, in November, 1863, divide the land and negroes between them as a temporary arrangement, on the express agreement and understanding that the title should not pass, but the same was to be held subject to the debts of the estate and legacy of complainants, until a suitable time should arrive when a sale could be effected for good money; that it was so held until after the war, and in 1866 the land was regularly sold by him, as executor, and for full value. By amendment to the bill Mrs. Flanagan, Harmon and Willis, who had purchased the land, were made parties, and a decree was prayed against them, that their deeds should be canceled and the land declared subject to complainants' legacy:

Held, that the arrangement made by the executor with the other residuary legatee, at the time and under the circumstances it was done, was not such an appropriation of the assets of the estate as to make him liable for the same as for a *devastavit*. The possession of the land having been resumed by the executor and regularly sold in 1866, the proceeds of the sale was subject to administration for the purpose of paying debts and legacies; and as there is no contest that the land did not sell for its value it cannot be again made liable to the same claims.

2. There having been no motion for a new trial, and there being no charge of the court to prevent the jury from making allowances in their verdict for the rent and hire of 1864, and rent for 1865 and 1866, and no refusal to charge any request on that point, we cannot inquire into any alleged error in the verdict for not including the same.
3. The answers of the defendants, so far as they go to explain the arrangement made for the disposition of the land and negroes in November, 1863, are, under the charges in the bill, responsive, and were properly submitted to the jury as evidence.
4. It is not necessary that a defendant should make an affidavit of any sort for the purpose of amending his answer, unless in the case of a sworn answer to make oath to the amendment.
5. When a complainant does not rely on the answer of the defendant, and introduces other evidence on the trial, the defendant, if he offers no evidence, is entitled to the conclusion in the argument to the jury.

Administrators and executors. New trial. Equity. Discovery. Amendment. Order of argument. Before Judge POTTLE. Lincoln Superior Court. October Term, 1873.

Henry Ferguson, for himself, and as next friend of his minor brothers, Davenport and Socrates Ferguson, filed his bill against Socrates G. N. Ferguson, as executor upon the

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state of John Ferguson, deceased, making, in substance, the following case :

John Ferguson departed this life about February 17th, 1863, leaving a will, by the fourth item of which he bequeathed to complainant and his said two minor brothers (his grand-children,) a joint legacy of \$3,000 00, in equal parts to each, to be set aside for this purpose out of his estate, as soon as the debts and expenses of the same shall have been paid. By the fifth item, the testator directed the sale of such of his personal and real property as might be necessary for the payment of his debts and said joint legacy, in the event that the sale of his perishable property should prove insufficient for that purpose. The will was admitted to probate, letters testamentary issued to defendant, and he took possession of the estate, consisting of lands and personality, amounting to about \$25,000 00 in value. The defendant, after selling a portion of the perishable property and paying the debts of the estate, in violation of the provisions of the will, in the month of November, 1863, proceeded to a division in kind of the lands and negroes between himself and his sister Elizabeth Flanagan, the residuary legatees. The hire of the negroes for the years 1863, 1864 and 1865, amounted annually to \$250 00. The rent of the land for the same years, and until the month of November, 1866, when it was sold by the defendant, was worth \$250 00 per annum. These sums are assets in the hands of the defendant for the payment of debts and legacies, and are not the property of the residuary legatees. Complainant and his said minor brothers have never been paid said legacy. The aforesaid division of property was an assent to the legacy and an admission of assets. Prayer, that an account be had, and that a decree be rendered for the payment of the same, etc.

The defendant presented the following facts in his answer : Denies that in November, 1863, he proceeded to a division in kind of the lands and negroes of the estate, between himself and his sister Elizabeth Flanagan, after the payment of all the debts, but alleges the contrary to be true, that the di-

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vision was made under an express agreement between himself and Elizabeth Flannegan, that the property was to be held subject to the unpaid debts of the estate and the legacy bequeathed to complainant and his two minor brothers. The legacy was not paid at the time appointed by the will, for the reason that the currency of the country was then almost entirely worthless, and defendant having been appointed trustee for the said legatees, did not consider it right or just to set aside said legacy in such currency which many of the creditors were refusing to receive. He hoped and believed that the time would come when the land and negroes could be sold for good currency, and an amount realized sufficient to pay the debts, the legacy to complainant and his brothers, and to leave a residuum. Contrary to his expectations a large portion of the estate was lost by the emancipation of the negroes. After the termination of the war he sold the said lands, and appropriated the proceeds thereof to the payment of the debts of the estate. On account of the scarcity of money in the country, the sale was not as favorable as he had anticipated, and he advanced money and property of his own in the settlement of said debts. All of the property of the estate which came into the hands of the defendant, has, in good faith, with the exception of the negroes, who were emancipated, been applied to the satisfaction of the debts.

To the answer were attached inventory, returns, etc.

The complainants, by an amendment, made Thomas P. Harmon, Elizabeth Flannegan, and Isaiah Willis, purchasers of said land, parties defendant, alleging collusion with the executor, etc. The answers of these defendants set up, in substance, the same defense presented by the answer of the executor, also improvements placed on the property, the good faith of their purchase, and the absence of all fraud and collusion.

The complainants again amended his bill by surcharging and falsifying the accounts of the executor as appended to his answer. To this the executor filed an amended answer, unnecessary to be set forth.

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Neither the bill, nor any of the amendments, contained any waiver of discovery.

When the case was called, counsel for the complainant moved to strike so much of the answers of the defendants as sought to qualify and limit the division of the property among the residuary legatees to a mere temporary arrangement, without vesting in them the title. Also to strike from said answers the plea of *plene administravit* and all averments in support of the same, as being irrelevant, the division of the property having been admitted. Also, to strike the amended answer of Socrates G. N. Ferguson upon the ground that it was not based "on the necessary preliminary affidavit."

The three motions were overruled and complainants excepted.

The court permitted such portions of the answers of the defendants as explained the alleged division of the land and negroes in November, 1863, to be read in evidence to the jury, as responsive to the bill, and complainant excepted.

The complainants introduced testimony. The defendants relied entirely upon their answers. The court awarded the concluding argument to the defendants, and complainants excepted.

The evidence is omitted, as unnecessary to an understanding of the decision.

In reference to the division of the property between the residuary legatees, in November, 1863, the court charged the jury as follows:

"I charge you, that if you believe that the parties to this division, afterwards, in 1866, voluntarily surrendered the land to the executor to be sold in due course of administration, and if it was sold, and fairly sold, in open market, according to law, the executor is not responsible for this part of his *devastavit*, though the evidence should satisfy you that he did assent to the legacy, so as to vest the title in himself and co-residuary legatee. If he did do wrong, that wrong could be cured by a surrender of the land for sale to pay the debts and this legacy."

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To this charge complainants excepted.

The jury found for the complainants \$690 50, with interest from November, 1866, against Socrates G. N. Ferguson. No motion for a new trial was made.

Error is assigned upon each of the aforesaid grounds of exceptions.

W. D. TUTT; C. R. STROTHER, for plaintiffs in error.

W. M. & M. P. REESE, for defendants.

TRIPPE, Judge.

1. The chief contest in this case was to obtain a decree subjecting the land which had belonged to the testator, and was sold by the executor in 1866, to be sold again for the payment of complainants' legacy. There was no issue made that the land did not sell for its value, or that there was actual fraud committed by the executor and the present owners of the land, which would vitiate the sale. The point raised is, that the executor and his sister, Mrs. Flannegan, as residuary legatees, divided the land between them without the legacy of \$3000 00 to complainants having been paid. The bill charges that this was done after the debts of the estate had been paid, and that such a division was a *devastavit* on the part of the executor. The answer sets up that the executor and his sister only took the property under a special agreement that it was a temporary arrangement, and that it was to be held without the title passing, subject to the debts against the estate and the legacy of complainants, and until a suitable time should arrive when a sale could be effected for good money. This was in the latter part of 1863, and reasons are given why no sale was then had, to-wit: the condition of the country from the then existing war and the great depreciation of the only currency in circulation. The land was so held until after the war, and was sold in 1866, and by the returns of the executor the proceeds of the sale went to the payment of the debts, except the amount found in favor of complain-

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ants. If there were outstanding debts, they had a priority over the claim of complainants for their legacy; and if the action of the executor and Mrs. Flannegan in the division, was illegal, the creditors did not lose their right to have their debts paid or lose their priority over legacies. They could have forced the very sale that was made, and there is no reason why the executor should not do that, which by law he could have been compelled to do, or which is practically the same thing, do that which the creditors could have effected by obtaining judgments and enforcing a sale under them. In any event, the debts must have been paid. The jury found that these debts consumed a large portion of what the land brought, and there was no motion for a new trial on the ground that the verdict was wrong on that point. So it must be taken as an established fact that the land was sold and the proceeds applied to the payment of debts. If so, it cannot be subjected to a resale.

2. The jury rendered a verdict for complainants against the executor for \$690 50, with interest. It was urged that the executor and Mrs. Flannegan were liable for the rent of the land and hire of the negroes for 1864 and the rent for 1865 and 1866. This may have been true. But no motion was made for a new trial. There was no charge of the court excepted to as preventing the jury from making allowance in the verdict for the hire and rent, nor any exception to a refusal to charge a request on that point, and we cannot inquire into any alleged error in the verdict for not including the same: See *McRae vs. Adams*, 36 *Georgia*, 442.

3. The answers of the defendants, so far as they go to explain the arrangement made for the disposition of the property in November, 1863, are responsive to the charge in the bill on that matter, and to that extent were evidence. Any explanation of an admission made, or fact necessarily connected with it, is part of the response: Code, section 3106; 14 *Georgia*, 429; 10 *Ibid.*, 208. The answer on this point comes within the rule. It is true there were no interrogatories with numbers put in the bill; but there was no

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waiver of discovery. A mere omission to insert questions with numbers to them, as set forth in section 4176, Code, does not deprive a defendant of the benefit of his answer so far as it is responsive to the charges in the bill. He may confine his discovery to those points to which special interrogatories are placed in the bill, (Code, section 3104,) but that is a privilege, and no right is lost thereby. If a complainant wishes to avoid making the answer of the defendant evidence, he must, under Code, section 3101, waive discovery.

4. Besides the very broad provisions of section 3479, Code, allowing amendments, it is specially declared in Code, section 4195, that "a sworn answer is subject to amendment at any time, by leave of the court, as other pleadings; but an admission made in such answer shall always be evidence, when offered by the other party." It is not necessary that an affidavit of any sort should be made by a defendant for the purpose of amending an answer. There might be cases in which the court, in its discretion, might be authorized to require a statement under oath of the facts connected with making the amendment, before leave would be granted for allowing it to be made. Indeed, this was the general rule as to permitting amendments to sworn answers: *Martin vs. Atkinson*, 5 Georgia, 390; *Cary vs. Ector*, 7 *Ibid.*, 99; Daniels' Pleadings and Practice, 914. But this was before the adoption of the Code, which has put such amendments on the same footing as amendments to other pleadings: Code, sections 3479, 4195. Of course, any answer, whether it be the original or an amended answer, must be sworn to, before it can be used as evidence.

5. Complainants introduced several witnesses before the jury; the defendants offered none. The court held that the defendants was entitled to the conclusion in the argument to the jury. There was no error in this. Section 4207, Code, declares that "the rules of evidence shall be the same as in trials at law, and the rules of practice as to continuance, and in the conduct of the case before the jury, except that when a complainant *relies solely on the defendant's answer*, he shall be

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entitled to open and conclude the cause." Complainants did not rely solely on defendants' answers, but introduced other evidence, and so far as we can determine from the record, all the testimony of any kind which was before the jury was presented by them. If so, the conclusion was properly awarded to defendants.

Judgment affirmed.

**GRANT, ALEXANDER & COMPANY, plaintiffs in error, vs.
THE SAVANNAH, GRIFFIN AND NORTH ALABAMA RAIL-
ROAD COMPANY, defendant in error.**

[TRIPPE, J., having been of counsel, did not preside in this case.]

1. Where a contract between a railroad company and contractors provided that the chief engineer of the company should be the inspector of the work, and determine when the contract had been complied with ; that all disputes and differences should be adjusted by him, and his decision should be conclusive without further recourse or appeal ; that should the work, in the opinion of the engineer, not progress in such manner as to insure its completion by the time stipulated, the said engineer, after giving ten days' notice, might proceed to have the work executed by hiring men, or by sub-contracting such portions thereof as he might deem necessary to insure its completion, at the expense of the contractors :

Held, that said engineer was made the arbitrator of the rights of the parties under the contract, and his decision was as conclusive and binding as the award of any other arbitrator, and could only be attacked for fraud or some other ground of illegality recognized for that purpose.

2. If the engineer failed to give the ten days' notice to the plaintiffs, as the work was progressing, prior to the time at which it was to be completed, and the company failed to avail itself of the privilege which it had, by the terms of the contract, to insure the completion of the work by that time, and allowed the plaintiffs to proceed with the work under the contract, making monthly estimates therefor, and if, when the work was completed, the engineer made a final estimate of the work, and if, in making such final estimate, he certified that it was finished according to the contract, with the exception of certain specified

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deductions made therein, then such acts and conduct on the part of the defendant would, in contemplation of the law, be a waiver of any claim for damages against the plaintiffs, under the contract, for not completing the work by the time stipulated therein, and the defendant would be estopped from claiming damages therefor.

Railroads. Arbitrament and award. Waiver. Estoppel. Contracts. Before Judge HALL. Spalding Superior Court. May Adjourned Term, 1873.

For the facts of this case, see the decision.

NISBET & JACKSON; WHITTLE & GUSTIN; DOYAL & NUNNALLY, for plaintiffs in error.

B. H. HILL & SON; PEEPLES & HOWELL; A. W. HAMMOND & SON; BOYNTON & DISMUKE; SPEER & STEWART, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant to recover a sum of money alleged to be due them as railroad contractors, on the following contract:

"Articles of agreement made and concluded this twentieth day of October, one thousand eight hundred and sixty-nine, between the engineer of the Savannah, Griffin and North Alabama Railroad, for the company, on the one part, and Grant, Alexander & Company, on the other part, whereby it is covenanted and agreed as follows:

"The said Grant, Alexander & Company, on their part, covenant and agree to finish all the work on the Savannah, Griffin and North Alabama Railroad, between Griffin and Newnan, embracing masonry and foundations for Head's, White Water and White Oak creeks; all the first-class Howe truss-bridges over Flint river, White Water, Line, Griffin, White Oak and Turkey creeks; build all culverts that may be required, and repair those that may be in bad order; lay the track; remove all slides and clear out all ditches, com-

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mencing opposite the west side of the Macon and Western Railroad ticket office at Griffin, and ending at the crossing of the Savannah, Griffin and North Alabama Railroad of the Atlanta and West Point Railroad, at Newnan—all to be done in accordance with specifications and instructions of the chief engineer or his representatives, by or before the first of June, 1870.

"And the engineer, for his company, on his part, does covenant and agree to pay the said Grant, Alexander & Company, when the work herein contracted for shall have been faithfully executed, according to orders, at the following rates, *pro rata* of work, the same to be judged by the engineer, viz: Ninety per cent. to be paid in cash as the work progresses, and ten per cent. in stock of the company. The railroad company to furnish the necessary engine and cars for laying track, clearing out ditches, and transporting all necessary material for trestle-work, bridges, etc.

"And it is agreed, that the said Grant, Alexander & Company, party of the second part, will not let or transfer this contract, or any part thereof, without the consent of the chief engineer. And it is further agreed, that the chief engineer of the Savannah, Griffin and North Alabama Railroad Company, or some person or persons appointed by him, shall be the inspector of the said work, and determine when this contract has been complied with according to its just and fair interpretation, and the amount of the same, and all disputes and differences under it to be adjusted by him, and his decision shall be conclusive without further recourse or appeal; and should the work, in the opinion of the engineer, or his representatives, not progress in such manner as to insure the completion by the time above stipulated, the said engineer, after giving ten days' notice, may proceed to have the work executed by hiring men, or sub-contracting such portions of the work as he may deem necessary to insure its completion, at the expense of the above contractors, (Grant, Alexander & Company.)

"In witness whereof, the said parties have hereunto set

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their hands and seals, this twentieth day of October, eighteen hundred and sixty-nine.

"M. CORPUT,

"Ch. Eng. S., G. and N. A. R. R.

"GRANT, ALEXANDER & CO.

"Witness : A. J. LANE.

"Approved, A. J. WHITE,

"President S., G. and N. A. R. R.

"Macon, October, 1869."

To the plaintiffs' action, the defendant plead that the contract was not performed by the plaintiffs by the time specified therein, and claimed damages in consequence thereof, which damages the defendant sought to *recoup* against the plaintiffs, demand in the nature of a cross-action therefor. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiffs for \$10,000 00 in the stock of the defendant's company, (about which there was no controversy,) but allowed the defendant to *recoap* in damages against the plaintiffs the entire amount of their claim over and above the amount of stock claimed by them. A motion was made by the plaintiffs for a new trial on the several grounds therein set forth, which was overruled by the court, and the plaintiffs excepted.

1. The plaintiffs introduced in evidence the following document, the same being the final estimate of the work done by plaintiffs under the contract by its chief engineer on the road :

"1870. *Savannah, Griffin and North Alabama Railroad Company*
 "To *Grant, Alexander & Company, Dr.*
 "To completing and finishing the gradation, masonry, bridging and track-laying of the *Savannah, Griffin and North Alabama Railroad* from *Griffin to Newnan*, as per contract..\$100,000 00

FINAL ESTIMATE.

"Deduct former payments.....	\$ 79,758 00
" for unfinished embankments.....	100 00
" for unfinished rock-cut, (sec. 84), ..	25 00
" for surface culverts not built, 72 cubic perches, \$8 00.....	216 00—80,099 00
" Balance due.....	\$19,901 00

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"I certify that the above estimate is correct, and that the work is finished according to contract with the exception of the above deductions.
(Signed) "H. S. WATT, *Engineer.*"

The engineer was examined as a witness, and stated that the final estimate was not dated, by an oversight of his, but it was made out on the 28th of October, 1870. It appears from the evidence in the record that the road was not completed to Newnan until about the 20th of October. The main controlling question in this case is, what is the proper legal interpretation of the contract made by the parties? When a contract is written in plain unambiguous words, the construction of it is a question for the court, and not a question for the jury. What is the fair legal construction and interpretation of the contract made by the parties for the building of defendant's road from Griffin to Newnan? The plaintiffs contracted on their part to build the road in accordance with specifications and instructions of the chief engineer of the company or his representative, by or before the first of June, 1870. The defendant contracted to pay the plaintiffs therefor when the work shall have been faithfully executed according to orders, at the following rates *pro rata* of work, the same to be judged by the engineer, to-wit: ninety per cent to be paid in cash as the work progresses, and ten per cent in stock of the company—the company to furnish the necessary engine and cars for laying track, cleaning out ditches etc., as specified in the contract. The plaintiffs were not to let or transfer the contract, or any part thereof, without the consent of the chief engineer. It was further stipulated in the contract that the chief engineer of the company, or some person or persons appointed by him, should be the inspector of the work, and determine when the contract had been complied with according to its just and fair interpretation, and the amount of the same, and all disputes and differences under it to be adjusted by him, and his decision shall be *conclusive*, without further recourse or appeal. It was the clear intention of the parties, as expressed in this contract, and such is its legal effect, that the engineer of the company should be

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the arbitrator to determine when the contract had been complied with by either party, and to adjust all disputes and differences between them under it, and his decision was to be conclusive upon them, whether the same related to the performance of the contract by the plaintiffs or the defendant. Their chosen arbitrator, by the express terms of their contract, was to determine all disputes and differences between them arising under it, without further recourse or appeal; that is to say, the engineer of the defendant was to be the arbitrator to determine when the contract had been complied with according to its just and fair interpretation, and the amount of the same, and all disputes and differences under it were to be adjusted by him, and his decision should be conclusive, without further recourse or appeal, and when said arbitrator had determined that the contract had been complied with by either party thereto, and the amount to be paid for the work done under it, the decision or award of such arbitrator was as conclusive and binding upon the parties to that contract as the decision and award of any other arbitrator or arbitrators would be under the law, and could not be attacked or set aside, unless for fraud or other grounds of illegality recognized for that purpose: *Milner & Company vs. The Georgia Railroad and Banking Company*, 4 *Georgia Reports*, 385; *The Atlanta Air Line Railroad Company vs. Mangham & Prickett*, 49 *Georgia*, 266.

2. The clause in the contract which provides that if the work, in the *opinion of the engineer*, should not progress in such manner as to insure its completion by the time stipulated, the engineer, after giving ten days' notice, may proceed to have the work executed by hiring men, or sub-contacting such portions of the work as he may deem necessary to insure its completion at the expense of the contractors, was evidently inserted therein, for the benefit and protection of the defendant. The defendant's engineer would be presumed to know the condition and progress of the work he was superintending, but there is positive evidence in the record that he did know it, and complained that the work was not progress-

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ing, but he did not give the notice to the plaintiffs which he was authorized to do by the terms of the contract; the plaintiffs were allowed to go on with the work and to complete it after the first of June. The defendant now claims damages because the work was not completed by the first of June. The engineer of the defendant could have had the work completed by that time at the plaintiffs' expense, on giving the ten days' notice, if he had deemed it necessary for the interest of the company, and had thought proper to have done so, but he did not act in the matter, and left the plaintiffs to prosecute the work until they finished it in October, he continuing to make out his monthly estimates for the work done by plaintiffs under the contract up to that time. If the defendant, under a fair and just interpretation of the contract, had intended to claim damages of the plaintiffs for not completing the work by the first of June, its engineer should have given the ten days' notice within a reasonable time, so as to have enabled the plaintiffs to have acted upon it, or have completed the work itself in the manner specified in the contract, at their expense. The engineer failing to give the ten days' notice to the plaintiffs, as specified in the contract, within a reasonable time, and continuing to make out their monthly estimates for the work done under the contract, the plaintiffs had the right to believe that the defendant had waived its claim for damages under the contract for the non-completion of the work by the first of June. The defendant certainly did not seek the remedy for which it stipulated in the contract, and not having done that, the law will not allow it to resort to another, at its own option, to the prejudice of the plaintiffs who have acted upon its conduct, and completed the work after the expiration of the time. By not resorting to the remedy stipulated in the contract for its own benefit and protection, of which the plaintiffs were entitled to the ten days' notice by the engineer, within a reasonable time, they are placed in a worse position than they otherwise would have been in regard to the damages now claimed. If the ten days' notice had been given within a reasonable time, as stipulated in the contract,

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the plaintiffs would have had the right to have placed an additional force on the work, and thus have reduced the expense to which the defendant might have subjected them by the employment of hands to finish it, or the amount of damages now claimed. But as this stipulation in the contract was for the protection and benefit of the defendant exclusively, it had the right to waive it if it thought proper to do so, and having waived it, it cannot resort to another remedy to recover damage for the non-completion of the work in time, when to do so would be prejudicial to the rights of the plaintiffs who have *acted* upon that waiver of the defendant. A party may waive a right, by express words, or by such acts and conduct, as in contemplation of law, will amount to a waiver. The defendant in this case, not only failed to seek the remedy stipulated in the contract for damages in not completing the work by the first of June, but allowed the plaintiffs to go on with the work after that time, making out its monthly estimates for the work done under the contract, and when the work was completed a final estimate was made by the defendant's engineer, in which he certifies there is a balance due the plaintiffs under the contract of \$19,901 00, and that the work had been finished according to contract, with the exception of certain specified deductions made therein. Blackstone defines an estoppel to be, where a man hath done some *act* which estops or precludes him from averring anything to the contrary: 3 Black. Com., 308. Estoppels may arise either by matter of record, by the deed of the party, or from matter in *pais*: 1 Bouvier's Law Dictionary, 376, and authorities there cited.

This claim for damages for the non-completion of the work by the 1st of June, in view of the facts contained in the record, looks very much like it was an after-thought. It is true that White, the president of the company, states in his evidence that about the middle of June he first gave Grant, one of the plaintiffs, notice of his claim for damages on account of the payment of interest to the stockholders. Grant, in his evidence, states that he never knew of any intention to claim damages for delay in finishing the work until about the

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10th of November, when he went to White's office, in Macon, for a final settlement, and then he informed him that he would not settle until his claim for damages was allowed. This was after the work had been completed by the plaintiffs. Assuming that White did give Grant notice in the middle of June, as stated by him, that was not the kind of notice stipulated for in the contract. The ten days' notice contemplated by the contract was to be given by the engineer whilst the work was progressing, prior to the 1st of June, so that the plaintiffs might take steps to complete the work by that time, or that the defendant might proceed to have the work executed, if it deemed it necessary to insure its completion by that time, at the expense of the plaintiffs. By the terms of the contract the giving of the notice was made to depend on the *opinion* of the defendant's engineer as to the progress of the work, to insure its completion by the 1st of June; *he* was the arbitrator chosen by the parties to determine that question and to give the notice.

In view of the stipulation in the contract as to the ten days' notice to be given by the defendant's engineer to the plaintiffs as the work progressed, and the rights and privileges of the defendant under it to insure the completion of the work by the time stipulated in the contract, and in view of the evidence in the record as to the waiver of the time of its completion on the part of the defendant, by its acts and conduct, the court below should have charged the jury that if the engineer of the defendant failed to give the ten days' notice to the plaintiffs as the work was progressing, prior to the 1st of June, and failed to avail itself of the privilges which it had by the terms of the contract, to insure the completion of the work by that time, and allowed the plaintiffs to proceed with the work under the contract, making monthly estimates therefor, and if when the work was completed the defendant's engineer made a final estimate of the work, and if in making such final estimate of the work he certified that it was finished according to the contract, with the exception of certain specified deductions made therein, then such acts and conduct on

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the part of the defendant would, in contemplation of the law, be a waiver of any claim for damages against the plaintiffs under the contract, for not completing the work by the time stipulated therein, and the defendant would be estopped from claiming damages therefor. In our judgment, by the terms of the contract, the defendant's engineer was made the arbitrator to determine when the contract had been complied with by either party, and to determine all disputes and differences between them arising under it, and his decision in relation thereto was to be *conclusive*, and that being so, it necessarily follows that when the defendant's engineer made his final estimate of the work done by the plaintiffs for the defendant, as set forth in the record, and certified that it was correct, and that the work was finished according to contract, with the exception therein stated of certain deductions, that final estimate of the defendant's engineer was his decision and award, and was as binding and conclusive upon the plaintiffs and defendant as the decision and award of any other arbitrator or arbitrators, and the court below erred in admitting any evidence at the trial going behind that award for the purpose of showing that either party had sustained damage on account of the non-performance of the contract by either of the parties thereto. The judgment of their own chosen arbitrator was *conclusive* upon them, and the law will compel them to abide by it, unless it can be attacked for fraud or other recognized ground of illegality for setting aside an award. The view which we have taken of this case renders it unnecessary for us to express any opinion as to the rule of damages given in charge by the court to the jury.

Let the judgment of the court below be reversed.

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REUBEN J. BUTT, plaintiff in error, vs. THOMAS ONEAL, defendant in error.

Where a bill was filed praying an injunction against the enforcement of an execution, and it appeared that the plaintiff in the execution had filed a petition for partition of a parcel of land on which was a mill, the petition alleging that the petitioner and A had owned the land in common and had agreed to run the mill in partnership, but that A had sold his interest to B, and that C had set up certain claims against the partnership; that commissioners had been appointed to investigate the accounts and to sell the land; that the commissioners had reported that they had investigated the accounts of the partnership between the petitioner and A., and found the petitioner entitled to \$1,000 less \$200, and that the firm owed C nothing. A, B and C all excepted to the report, and the issue was tried by a jury, who found in favor of petitioner \$800 00. Petitioner's counsel entered up a judgment against A, B and C for the amount, and execution was levied on the property of C, who filed the bill, insisting that the judgment should have been entered against A alone:

Held, that the judge did not err in granting the injunction. Under the pleadings it is impossible to say what was the real intent of the verdict of the jury, and equity and good conscience requires that there should be a rehearing.

Injunction. Verdict. Before Judge BUCHANAN. Troup Superior Court. November Adjourned Term, 1873.

Thomas Oneal filed his bill against Reuben J. Butt, making substantially the following case:

At the May term, 1872, of Troup superior court, the defendant made application for the partition of certain realty and personality, in which Hilliard Oneal, Edward F. Culver and complainant were interested. The petition presented the following facts:

On the first Tuesday in October, 1849, petitioner and Hilliard Oneal became the joint owners of a certain tract of land known as the "Oneal mill property," embracing twelve hundred and fifty-two acres, more or less, with valuable water privileges thereto attached, and a large merchant mill located thereon. After conveying to divers persons small portions of the land, the balance, with the exception of the mill property

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and twenty acres immediately surrounding it, was divided between them by arbitration, and the award filed in the clerk's office of the superior court of said county, on January 29th, 1872. In this arbitration the state of the mutual accounts existing between them was not considered. At the time of the purchase of the aforesaid property, petitioner and Hilliard Oneal were executors upon the estate of James Oneal, deceased. They agreed that the business of the mill and that of managing the estate should be conducted by them jointly, each to give attention to that which, in the exigencies of the business, should come to him, and without extra charge the one to the other, and that the profits should be equally divided between them. Thus the business proceeded for years, petitioner giving more attention to the matters of the estate. It became established between them as a custom that they would alternate annually in employing a miller. In 1866, Oneal hired his son-in-law, Edward F. Culver. During that year a saw-mill was also put in operation. In February or March Oneal possessed himself of the books of the concern, and denied to petitioner any participation in the management of the business. At the close of the year Oneal admitted the custom heretofore referred to, but upon petitioner's contracting with a competent miller, at a reasonable price, he objected to him, and without the consent of petitioner, retained his son-in-law. This condition of affairs continued until February 15th, 1870, when the rupture became more distinctly defined. Petitioner complained of the conduct of the miller which had been calculated to prevent custom and patronage, when said Culver told him, in the presence of and with the consent of Oneal, that he was not doing business for him. Petitioner then hired W. McGee and placed him in the mill, and a division of the grain on hand was made. Petitioner has received at various times from the mill small sums of money aggregating about \$515 00, and some bread corn and flour, but not exceeding one-third of what he was entitled to. Petitioner made frequent requests for a settlement, but it was deferred upon various pretexts. In the fall of 1869 he obtained sufficient access

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to the books to ascertain that after allowing to Oneal all the credits which he claimed, there was a balance due him of at least \$1,071 00.

Oneal asserts that he has sold his half interest in said mill property to his son Thomas, and said son claims such interest, but petitioner has never consented to this transaction. Culver, confederating with Hilliard Oneal, presents a claim of \$1,200 00 against said mill.

This property, on account of the machinery and water-power, cannot be divided without a sale. Therefore prays the appointment of commissioners, that the accounts between the aforesaid parties may be adjusted, that the partnership may be dissolved, that the property may be sold, and that such portion of the proceeds as may be due to petitioner shall be paid him.

The bill further recited that commissioners were appointed to examine the mutual accounts between the parties, and to sell the property. That the commissioners reported that they found against the claims of Culver, and in favor of the petitioner, Reuben J. Butt, \$1,000 00, subject to a credit of \$200 00; that the mill property was sold to James Oneal for \$4,405 00, one-third of which has been paid in cash, and a secured note for the balance taken; that the personalty sold for \$54 75; that the expenses of sale, etc., were \$29 50.

That to this report of the commissioners the petitioner Reuben J. Butt, and the defendants to said petition, to-wit: Hilliard Oneal, Thomas Oneal and Edward F. Culver, all excepted. The exception of Butt was based upon the ground that the commissioners did not take charge of the books of Oneal & Butt, and of the evidences of indebtedness due to said firm, and return the same to court. The exceptions of Culver and Hilliard Oneal went at length into the accounts between all the parties, and sought thereby to show the incorrectness of the result arrived at. They also set up various irregularities in the proceedings of the commissioners. Thomas Oneal said that he was not indebted to petitioner in the manner and form as alleged, and that since January, 1872, he had

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been the only co-tenant with petitioner, in the ownership, use and possession of said mill property.

That all of the issues thus formed were submitted together to a jury, who returned the following verdict: "We, the jury, find for the plaintiff \$800 00."

That this verdict ought in equity and good conscience be construed to mean, as was the intention of the jury, that the petitioner, Reuben J. Butt, should recover of the defendant, Hilliard Oneal, alone, and not of the other defendants, of which complainant was one. That notwithstanding this was the manifest intention of the jury in rendering such verdict, yet the defendant, Reuben J. Butt, entered judgment thereon against all of the defendants, including complainant. That execution has issued and been levied upon the property of complainant. Prays that the sale under said levy may be enjoined, subpoena, etc.

The answer of the defendant is omitted as not tending to elucidate the point passed on by the court.

The injunction was granted as prayed for, and defendant excepted.

B. H. BIGHAM, for plaintiff in error.

A. H. Cox, by brief, for defendant.

McCAY, Judge.

There are very serious objections to the whole course of proceeding in the original case. We have rarely seen an attempt to cover so many incongruous things in one proceeding, and that, too, a proceeding not in the nature of a suit, but a petition for partition. As, however, the parties do not seem to have objected, and participated in the various forms of proceedings which grew up under the petition, we should hold them too late now to interfere on this ground. But we think the judgment entered up in this case is not justified by the verdict, if indeed, it is sufficiently certain for any judgment. Under the allegations in the petition and in the order appoint-

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ing the commissioners, and in their report, it appears that there had been a partnership in running the mill between the two original owners; that the elder Oneal had sold first a part, then the whole of his joint interest in the property, to the defendant in error, and that Culver had set up a claim of a debt due him by the partnership.

Here, then, are, first, a petition for a partition of the real estate, which is a contest between Butt and the younger Oneal, then a claim for a settlement of the partnership affairs. This is between Butt and Hilliard Oneal, and, lastly, the demand of Culver. A report was made by the commissioners—they found that nothing was due Culver; second, that in estimating the partnership affairs \$1,000 00, less \$200 00, was due Butt. To this all parties, that is the two Oneals and Culver, excepted, and the matter went to a jury, who simply found for Butt \$800 00. In other words, they affirmed the report of the commissioners. Butt has treated this as a judgment in his favor against all for \$800 00. We think this unauthorized. It is hard to say what was the intent of the report. We should say, *prima facie*, it means that Butt is entitled to \$800 00 out of the proceeds of the sale. Perhaps, too, that if this was not enough, then it was to be paid by Hilliard Oneal, the partner. How James Oneal should, in any aspect of the matter, or Culver, be liable for it, we are not able to see.

This is not an ordinary suit against A, B and C, charging them with a debt; in such a case a verdict for the plaintiff generally for a fixed sum, would, by intendment of law, be against all defendants. But this is an anomalous proceeding to settle accounts and partition land, in which each defendant stands in a separate position, and the report and verdict ought to show how each stood. As the partnership was between H. Oneal and Butt, we say, *prima facie*, the verdict is against him, though there is a painful uncertainty as to the meaning. We think clearly it could not have been intended to be against Culver, and we hardly think it included the younger Oneal. We think, therefore, the report and the verdict too uncertain

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as against James Oneal to be enforced, and that the injunction ought to have been granted.

Judgment affirmed.

R. S. McFARLIN, administrator, plaintiff in error, *vs.* WILLIAM J. RINGER *et al.*, defendants in error.

1. An administrator *de bonis non* can sue a creditor of an insolvent estate for the recovery of what may have been paid him by a former representative of the estate, beyond such creditor's *pro rata* share of the assets.
2. As it appears doubtful from the record what was the amount of assets in the hands of the present representative for the payment of debts, and the inventory returned by him showing, without further explanation than is contained in the evidence, that a larger credit should have been allowed the defendant below than the jury gave him, we do not think the court erred in granting a new trial; nor do we feel authorized under the evidence to order any specific amount to be remitted from the verdict.

Administrators and executors. New trial. Before Judge BUCHANAN. Troup Superior Court. November Term, 1873.

R. S. McFarlin, as administrator *de bonis non cum testamento annexo*, upon the estate of R. D. H. Tharp, deceased, filed his bill against William J. Ringer and Martha M. A. Tharp, making this case:

R. D. H. Tharp died testate in the year 1864, leaving an insolvent estate. His widow, the defendant, Martha M. A. Tharp, qualified as executrix, and took charge of the property. The land was divided into parcels and advertised to be sold on twelve months' time, the purchasers to give mortgages as security. The sale took place on January 2d, 1866. The home place was sold subject to the widow's dower. One tract containing seventy-five acres, more or less, was bid off by the defendant, William J. Ringer, the brother of the executrix, for the sum of \$1,200 00. By the return of the proceedings had at this sale to the ordinary, the executrix sought to dis-

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charge Ringer's indebtedness for the purchase money of said land, by crediting it on certain notes held by him against the estate. There were other creditors of higher dignity whose claims were sufficient to exhaust all the assets. On exception made to this return, it was disallowed, and the executrix required to give bond, and failing to comply, her letters were revoked and complainant was appointed administrator *de bonis*, etc. He has been authorized to sell all the perishable property and land belonging to the estate. The former executrix has no means which can be reached at law. Ringer will neither pay the purchase money nor deliver up the land bought by him, he having a deed from said executrix. This sale was but the result of a combination between the defendants, by which they sought to defraud creditors of a higher dignity. Processes of garnishment have been served on Ringer at the instance of several creditors, requiring him to answer what he is indebted to said estate. He has answered denying any indebtedness, and his answer has been traversed. This is one of the pretexts set up by him why he cannot come to any settlement with complainant.

Prays that the defendant Ringer may be required either to pay the aforesaid sum of \$1,200 00 with interest thereon, or to deliver up the land.

To the bill was attached an exhibit showing that the estate was appraised, after it passed into the hands of complainant, at \$4,580 12. In addition to this, an attorney's receipt for three notes due the estate: one dated April 2d, 1864, due on demand for \$2,000 00; one dated March 31st, 1853, due December 25th thereafter for \$25 00; one dated March 25th, 1858, due at ten days, for \$25 00. Also an exhibit showing judgments against the estate to the amount of \$4,776 84, (only one of which for \$286 00 principal, and \$20 86 interest to January 17th, 1862, with accruing interest, was obtained prior to the death of the testator,) and notes and accounts to the amount of \$1,818 91.

The defendant Ringer, by his answer, admitted the allegations of the bill as to the sale of the land to him, but denied

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all fraud and collusion ; says that prior to the service of processes of garnishment upon him, nothing had been said between the executrix and him as to crediting his bid upon his claim against the estate, but that then it became necessary that a settlement should be had in order that he might make correct answers as to his indebtedness to the estate, if any existed ; that this settlement resulted in demonstrating that the estate was indebted to him about \$600 00 after allowing, as a credit on a note held by him, the amount of the purchase money to be paid for said land. Denies that there are claims of a higher dignity sufficient to exhaust all the assets, and asserts that at the time of said accounting he confidently believed that said estate would pay at least two-thirds of its indebtedness. Says that said settlement was made in good faith, and should not be set aside.

The answer of the defendant, Martha M. A. Tharp, simply corroborated that of her co-defendant, and shed no new light on the litigation.

The evidence disclosed that the complainant had paid out about \$1,200 00 on the claims against the estate ; that out of this amount was settled the only judgment obtained against the testator before his death, amounting to \$286 00 principal, \$20 86 interest to January 17th, 1862, and all accruing interest ; that the balance was applied to the indebtedness which was represented by notes at the time of his death, but upon several of which judgments had since been obtained. That claims amounting to \$10,000 00 or \$12,000 00 in notes have been presented to him ; that the estate is insolvent ; that he has paid between twelve and fourteen cents on the dollar on notes ; that he had between \$150 00 and \$175 00 on hand after paying out the \$1,200 00. That Ringer's claims have never been presented to him, though he had inquired how the estate would be paid out as to notes and accounts. That he knew Ringer claimed to have some debts against the estate.

In view of the verdict, the evidence as to the other issues presented by the bill and answers is omitted as immaterial.

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The jury found for the complainant \$981 60, with interest from the time the purchase money became due.

The defendant moved for a new trial upon the ground, among others, that the verdict was contrary to the evidence. The motion was granted, and complainant excepted and assigns error as follows :

- 1st. Because the verdict was not contrary to the evidence.
- 2d. Because, on the hearing of said motion, counsel for complainant asked that defendants' solicitors might be required to point out specifically in what amount the verdict was excessive, in order that the court, in deciding such motion, might allow to the complainant the privilege of writing off such excess.

B. H. BIGHAM ; SPEER & SPEER, for plaintiff in error.

B. H. HILL & SON ; W. O. TUGGLE, for defendants.

TRIPPE, Judge.

1. The estate of the testator, Tharp, is insolvent. The former representative is also insolvent. Mrs. Tharp was the executrix, and gave no bond, even when it was required of her, and was consequently removed. The complainant is the administrator *de bonis non*, and brought suit against Mrs. Tharp and the defendant, W. J. Ringer, for the purpose of recovering in behalf of other creditors, a large excess which it is claimed was paid by the executrix to Ringer as a creditor, over and above his proper share of the assets. If a creditor obtains from an insolvent representative of an insolvent estate more than his proportion of his debt, there is no other way to correct the wrong except by a suit against such creditor. This is more especially true if such creditor know that the estate is insolvent. If the executrix could respond for the *devastavit*, then a recovery against her would be sufficient. But if she and the estate are both insolvent, or if such creditor confederated with her to commit the waste, then the right

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exists against both. This suit was against both, and so was the verdict. If legacies have been paid, a creditor, after exhausting the assets in the hands of the executor, may proceed against each legatee for his *pro rata* share: Code, section 2467. The same principle would require a creditor to refund the excess that may have been paid to him.

2. A new trial was granted in the court below on the ground that the verdict was not sustained by the evidence. We take it that the court was of opinion that the verdict was for too great an amount under the testimony. We have looked closely through the long record in the case, embracing the returns of both representatives, and we cannot say that the court was so clearly wrong as to demand a reversal of his judgment. It is difficult from the record to ascertain what was the real amount of assets in the hands of the present representative of the estate for distribution amongst creditors. The greater that is, so much the greater would the defendant's (Ringer's) share be, and so much the more would he be allowed to retain. This, of course, would affect the recovery against him. A calculation was submitted by counsel for plaintiff in error, showing the amount of assets and of debts, making about twelve cents in the dollar to be paid on the note debts. If it be not more than this the verdict would seem to be about right. But on looking to the returns made by the administrator *de bonis non*, there appears in the inventory a return of four hundred acres of land, appraised at \$3,000 00, and several hundred dollars of claims or money received for rent. These do not, so far as we can see, appear to have been accounted for in the calculation. An item of \$600 00 for resale of land taken back from young Mr. Tharp is given. But that seems to have been a sale of two hundred acres. We cannot tell from the record what disposition should be made of these. If they were added to the calculation furnished us it would increase the amount of assets, and give the defendant a larger credit than the jury allowed. We are not clearly satisfied what would be a correct amount, if any, to be written off the verdict, as we were urged to direct should be done, provided

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this court thought it was too large. We therefore determine to let the new trial stand.

Judgment affirmed.

WILLIAM H. CLARK, plaintiff in error, vs. ALSTON B. CROFT, defendant in error.

1. Where during the trial of a suit on the law side of the superior court, the defendant was absent, and his attorney moved to file, as a plea, a certain bill in equity which the defendant had presented to the judge, asking an injunction of the common law suit, which bill was sworn to according to the usual form for verifying bills in chancery, but which the judge had not acted on, and the motion was denied on the ground, that though the facts set forth in the bill made a good plea, they were not sworn to as required by law:

Held, that this was error, as there was a substantial compliance with the law for the verification of pleas.

2. It is a good plea in defense to a note given for land, that a bond was given by the plaintiff to make a good title to the land on the payment of the price, free from *liens and incumbrances*, and that at the time of the making of the bond certain liens were known to exist; that the true title to the land was in several persons, of whom plaintiff was one; that it was the intent of the parties that the plaintiff should take up the liens and procure a title from the others before payment of the note; that the liens were still subsisting and the titles from the other joint owners still not obtained, and that the defendant had offered and was still willing and ready to pay on compliance with the contract.

Pleadings. Bond for titles. New trial. Before Judge BUCHANAN. Troup Superior Court. November Term, 1872.

Croft brought complaint against Clark on two promissory notes, each dated May 1st, 1869, one for \$1,250 00, payable to A. B., L. L. and G. N. Croft or bearer, on the first day of December next after the date thereof; the other for \$450 00, payable one day after the date thereof, to the same payees or bearer. Upon the last note were credits to the amount of \$300 00.

The defendant pleaded the general issue, and failure of consideration. The second plea was, in substance, as follows:

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That the notes sued on were given for a house and lot in the town of West Point, in the state of Georgia, in which Alston B. Croft, Mary L. Croft, (now Mary L. Harper,) Levy L. Croft, George N. Croft, Cleaveland L. Croft, Elizabeth Lyon, (now deceased,) and Florida C. Ward were interested. That the plaintiff gave to the defendant a bond to convey to him a perfect title upon the payment of the aforesaid notes. That he has been ready to pay said notes, provided he was satisfied that the plaintiff could comply with the condition of the aforesaid bond, but the plaintiff is unable to convey such title on account of the interest of the above named parties in the property sold. That there are judgments outstanding which operate as liens upon said house and lot, especially judgments against the plaintiff. That the plaintiff is indebted to the defendant in various amounts, which it was agreed should be credited on the aforesaid notes. That the plaintiff has not sufficient property, beyond that allowed him by the homestead law, to make the defendant secure, should he rely solely upon his bond.

When the case was called for trial, the defendant proposed to file a bill in equity as an amended plea. This bill had been prepared by him for the purpose of enjoining the aforesaid suit. It recited the facts set forth in the above plea, and also that the said plaintiff (in the common law suit) had contracted in his said bond that he would convey and assure, or cause to be conveyed and assured, the premises aforesaid to the defendant, or to such one and such persons as he should appoint or direct, free from mortgage or incumbrance, by such conveyance as said defendant might reasonably demand, upon the payment of the notes sued on. That at the time of said contract, it was understood between the parties thereto and referred to by them, that there were other parties who were interested in the property sold as heirs and legatees, and whose rights were "to be divested according to law," or else they would stand as among the incumbrances referred to in said contract.

To this bill was appended the following affidavit :

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"You, William H. Clark, do solemnly swear that the facts contained and set forth in this your bill in equity, as far as concern your own act and deed, are true of your own knowledge, and that which relates to the act or deed of any other persons, you believe to be true. So help you God.

(Signed)

"W. H. CLARK.

"Sworn to and subscribed before me,
this 9th day of November, 1871.

"W. F. WRIGHT, J. S. C. T. C."

This bill had been previously presented to the chancellor, but for various reasons had never been acted on.

It was objected by the plaintiff that there was nothing to amend by, as the pleas heretofore filed had been withdrawn at a previous term of the court for the purpose of being perfected. This was denied by defendant, but to prevent any question thereon he proposed then and there to file the two pleas above set forth, as well as said bill in equity, as his defense to said action. This the court refused to permit, and allowed a judgment by default to be entered.

The defendant moved for a new trial because of error in the aforesaid ruling. The motion was overruled, and defendant excepted.

This case was tried before Judge Wright, and the motion for a new trial heard before Judge Buchanan, his successor.

B. H. BIGHAM, for plaintiff in error.

LONGLEY & HARRIS, for defendant.

MCCAY, Judge.

1. We do not exactly understand why the bill offered as a plea was stricken. It was sworn to according to the form prescribed by the rule of court. Verification to the best of one's belief of matters not in one's own knowledge, but resting in the knowledge of others, is all that any man can do, and as pleas must, from the nature of things, often turn on facts not

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known to the defendant of his own knowledge, it follows that this kind of verification ought to be sufficient.

2. We think, if the facts set forth in the bill be true, the defense ought to succeed. In effect the paper set forth is an agreement to make a title free from liens and incumbrances. It is alleged that at the time of the bargain, certain liens and incumbrances were known to exist, and that the object in putting this unusual condition in the bond was, that they were to be removed before the money was paid. As these words are in the bond, in writing, and as we understand the meaning of them, we take it that the title is to be made not only with a warranty against liens and incumbrances, but that there were to be no liens or incumbrances when the money was paid and the title made. There would seem to be no other motive for the special introduction of these words; good warranty title would, under our law, cover liens and incumbrances, and it is usual to draw bonds for titles with these words only. If this be the proper construction, and we think it is, especially in view of the facts as they are stated to have existed at the time, we think it is a condition precedent that all liens should be removed before payment, and that the defendant may resist a judgment as long as he can show such liens exist. This is not the case of a simple warranty where the maker of the notes relies on the warranty, but by the terms of the contract, the parties have made the removal of the liens a condition precedent. On the question of continuance we say nothing, as we would not interfere with the discretion of the court. We will, however, say that it must be a very strong case indeed when an amendment to the pleadings—even to put in a plea where there is none—ought, under our law, to be denied. The statute says that either party may amend in any stage of the case, and except as to dilatory pleas and pleas of *non est factum*, when, from the nature of things, the first term is the only time to plead, unless for strong cause shown, we know no limit to the right to amend, except the terms the judge may put upon the amending party.

Judgment, reversed.

Anderson & Company vs. Chenney.

WILLIAM P. ANDERSON & COMPANY, plaintiffs in error vs.
FRANCIS M. CHENNEY, defendant in error.

1. The undivided interest of a partner in the firm property is not liable to levy and sale, even after dissolution, but must be reached by process of garnishment.
2. The claimant's right to be protected as a *bona fide* purchaser against the lien of the plaintiff's judgment, on account of his four years' possession of the property, cannot be defeated by a levy without the notice which the law requires to be given.

Partnership. Garnishment. Judgment. Lien. Purchaser.
Before Judge HALL. Newton Superior Court. September Term, 1873.

For the facts of this case, see the decision.

J. J. FLOYD, for plaintiffs in error.

CLARK & PACE, by PEEPLES & HOWELL, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which the jury, under the charge of the court, found the property levied on subject to the plaintiff's execution. A motion was made for a new trial on the ground of error in the charge of the court, and on other grounds, as set forth therein, which motion was overruled by the court, and the claimant excepted.

It appears from the evidence in the record that on the 25th of September, 1861, the plaintiff obtained a judgment against A. L. C. Hurst, the defendant, upon which execution issued on 17th January, 1862. On the 24th of May, 1869, Bowen, the sheriff, levied the execution on one-half undivided interest in a store-house and lot in the city of Covington, now occupied by Sheppard & Chenney as a store-house and shop, formerly occupied by Hurst & Brother, levied on as the property of A. L. C. Hurst. It also appears from the evidence in the record that on the 5th of August, 1873, sheriff Anderson gave notice, in writing, to the claimant that the property

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would be advertised for sale under the levy made by Bowen, in May, 1869.

1. One of the questions in the case was whether the property levied on was the partnership property of Hurst & Brother, or whether it was the individual property of A. L. C. Hurst, the defendant. The court charged the jury "that after the dissolution of partnership the undivided interest of one of the partners in the property of the late firm was liable to be levied on and sold under a judgment against one of the late partners, individually, and that if they believed from the evidence that the firm of Hurst & Brother had been dissolved before they sold the property levied on to George J. Hurst, although it had been a part and parcel of the property of the said firm, they should find the property subject." This charge of the court was error: Code, 1919; 40 *Georgia Reports*, 104. The copartnership property, after the dissolution of the partnership, is first liable to pay the partnership debts, before it can be made liable for the debts of one of the individual partners. The copartnership property is assets for the payment of the copartnership debts, as well after the dissolution of the partnership as before.

2. The other question in the case is a more difficult one to determine. The claimant purchased the property in November, 1867, and has been in possession of it ever since, and claims to be protected as such purchaser under the provisions of the 3583d section of the Code. The levy was made by sheriff Bowen on the property on the 24th of May, 1869, but no notice thereof was given to the claimant, who was in possession of it at the time of the levy, as required by the 3644th section of the Code, and the claimant swears that the first time he ever knew the property had been levied on was when sheriff Anderson gave him written notice, on the 5th of August, 1873, that the property would be advertised for sale under that levy. The court charged the jury "that if the levy was made within four years from the time of the purchase of the property from the defendant in execution, then the judgment had not lost its lien, and the property was subject."

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This charge of the court, in view of the facts of this case, was error. The claimant had been in the possession of the property, as a *bona fide* purchaser thereof for a valuable consideration, for five years and more before he had any notice of the levy that had been made thereon by sheriff Bowen, in May, 1869, and he was in possession of it when that levy was made. More than four years had elapsed from the date of that levy up to the time he was notified of it by sheriff Anderson. In our judgment the claimant's right to be protected against the lien of the judgment as a *bona fide* purchaser, under the provisions of the 3583d section of the Code, cannot be defeated by this *secret* levy without notice. When the law requires that in all cases of the levying an execution on land, written notice of such levy must be given to the tenant in possession, it means something, and the wisdom of that rule is apparent in view of the facts of this case. If the claimant, who was in possession of the property when the levy was made, had been notified of it as the law required he should have been, he might have taken steps to protect himself from loss by having recourse against his vendor, from whom he purchased the property. Besides, a levy made as this was, and remaining secret for four years, is calculated to open the door for the perpetration of fraud, and should not be encouraged. In order to defeat the claimant's possessory right, under the statute, by the levy made by Bowen in 1869, that levy should have been shown to have been made and notice given according to law.

Let the judgment of the court below be reversed.

ROBERT L. RACHELS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Under our Code, section 4514, "If any two or more persons, either with or without common cause of quarrel, do an unlawful act of violence," it is a riot, and a violent assault or attempt to commit a violent injury upon the person of another, is an illegal act of violence within the meaning of the law.

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2. Joint offenders may be separately tried, and the acquittal of one of two charged with an offense, which it takes two to commit, does not operate as an acquittal of the defendant not tried.
3. Where the verdict of the jury is such as is required by the evidence, this court will not reverse the judgment of the court below refusing a new trial, for an error in the charge of the court to the jury, which, under the facts proven, could have done the accused no harm.

New trial. Criminal law. Riot. Immaterial error. Before Judge STROZER. Mitchell Superior Court. May Adjournded Term, 1873.

Rachels was jointly indicted with one John Jones for the offense of riot, alleged to have been committed on October 21st, 1871. At the November term, 1872, Jones was tried and acquitted. At the May adjourned term, 1873, when the case against Rachels was called, he moved to quash the indictment on the ground that he could not, by himself, commit a riot. The motion was overruled, and defendant excepted.

The evidence made, substantially, the following case :

On the day alleged in the indictment, defendant and Jones approached one Capers King, in the town of Camilla, and asked him why he had levied on certain cotton. Defendant said to him that he had acted like a damned rascal. Jones said that he could whip King. Defendant pulled off his coat. They both advanced in a threatening manner. King stepped back and drew his pistol. At this time one Davis interfered and stopped defendant and Jones for a moment. They both again advanced, but were kept off by the pistol of King. There was some loud talking and cursing, but no blows were stricken. One witness testified that the manner of defendant and Jones was boisterous and tumultuous. They talked somewhat louder than the usual conversational tone ; could have been heard one hundred yards. The excitement collected together quite a crowd of citizens.

The jury found the defendant guilty. He moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and because the court erred in refusing to

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quash the indictment. The motion was overruled, and the defendant excepted upon each of the grounds aforesaid.

C. O. DAVIS; H. MORGAN, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

McCAY, Judge.

1. Our Code, section 4514, is in these words: "If any two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons so offending shall be guilty of a riot." Evidently here are two modes in which, under our law, a riot may be committed. If two or more persons do any unlawful act of violence, this is a riot; it may or may not be done in a violent and *tumultuous* manner. Again, if two or more persons, either with or without a common cause of quarrel, do any act in a violent and tumultuous manner, this also is a riot. Our Code makes its own definition of a riot. Whether it accords or not with the common law definition is wholly immaterial. It is enough for us that the legislature has declared the law to be so and so. It is for the courts to obey, and not to legislate. Very clearly if two join to do an illegal act of violence it is a graver offense than if done by one, and if many join in it, it is aggravated according to the number, and it is still a serious offense, though it be done in silence and order. Some of the greatest outrages of the day fill this very definition, and they are only the more heinous from the fact that they are done so coolly and deliberately that they cannot be said to be tumultuously done. We think, therefore, there was no error in the charge of the court that the defendant was guilty if he and King had jointly done an unlawful act of violence.

2. Nor was there any error in refusing to quash the indictment on the ground that Jones had been acquitted. Perhaps, as is contended here by the state's counsel, the form of this motion was defective, but we do not put our judgment on

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that ground. By our Code, section 4692, it is expressly provided that if "two or more defendants shall be jointly indicted for any offense, any one defendant may be tried separately, and if the offense be such as requires the joint action and concurrence of two or more persons, the acquittal or conviction of one shall not operate as an acquittal or conviction of any of the others not tried, but they shall be subject to be tried in the same manner." And this provision is the result reached by the legislature, after several considerations of the matter of changes in the common law as to the trial of joint offenders: Cobb's Digest, 841; Acts of 1855 and 1856, page 266; Acts of 1858, page 99. True, it seems somewhat incongruous to try one of two for a joint offense when the other has been found not guilty. But so the legislature has declared, and it is the duty of the courts, as we have said, as to the definition of riot, not to criticise but to obey. If one may be tried separately, it follows that neither the acquittal or conviction of the other should affect him. Every man on his trial must be shown to be guilty, and the guilt or innocence of his partner, if the case be one that requires a partner, must be made out by evidence on his trial. In the case before us it was necessary to prove them both guilty in order to make out a case against the defendant. Had Jones been found guilty, that finding would not be conclusive of Jones' guilt, on the trial of the defendant. It might be *prima facie*, but the truth of the matter would be open to inquiry, and if the jury on the trial of the defendant was satisfied that Jones was not guilty, it would be the right of the defendant to have an acquittal. Why should not the rule work the other way. If Jones' conviction would not estop the defendant from denying Jones' guilt, why should his acquittal estop the state from asserting it. In any event, as the defendant was not a party to Jones' trial, the result of it ought not to estop either party to the present issue. But, as we have said, it is not for the courts to defend but to enforce the legislative will.

3. The only objection to the charge, if there be an objection, is that the judge told them, in effect, that they might find

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the defendant guilty under either clause of the section. We are not sure that he was not right. The defendants are charged with an unlawful act of violence, done in a violent and tumultuous manner. We are inclined to think with the judge that the tumult is an aggravation of the offense, and that it was competent for the jury to find one of two verdicts, either guilty generally—that is, guilty of an unlawful act of violence in a violent and tumultuous manner, or simply guilty of an unlawful act of violence conjointly with King. Even if the charge was not strictly correct as to "any other act" under the indictment, the error did no harm, because the verdict is not guilty of any other act but guilty of the act charged, to-wit: the act of assault and battery; and the evidence fully justifies it.

Judgment affirmed.

THE SAVANNAH AND OGEECHEE CANAL COMPANY, plaintiff in error, vs. BENEDICT BOURQUIN, defendant in error.

[McCAY, J., was providentially prevented from presiding in this case.]

1. On the trial of an action brought by the owner of rice lands against a canal company, for overflowing his lands, by water escaping from the canal on account of the "sides and banks thereof being and continuing in bad and ruinous condition, for want of needful and necessary repairing and mending the same," the court charged the jury: 1st. That the defendant is responsible for damages caused by the bottom of the canal getting foul or filling up so as to cause the water to rise higher in the canal and to flow through a swamp or reservoir of the defendant's so that plaintiff's drains could not, under the ordinary flow, vent it. 2d. That if the jury found that any damages has resulted to the plaintiff by reason of the omission or commission of any act on the part of the defendant to keep its canal in proper order, the plaintiff is entitled to recover:

Held, that there is no evidence in the record as to the bottom of the canal being foul or filled up to authorize the first point in the charge, and the second is too broad and general for the pleadings.

2. The fact that a canal company has used for upwards of twenty years a break or opening in the bank of the canal where it runs through a

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swamp or pond, for the purpose of supplying the canal with water from the swamp as a reserve, and that there has also been during that period, at certain times, an outflow of water from the canal through the break, does not constitute such a prescriptive right in the company as to entitle it to increase intentionally, or by negligence, such outflow, so that it will cause the water to escape from the swamp, and submerge the land of an adjacent proprietor.

3. Damages for a continuing trespass, such as those arising from over-flowing one's land, can only be recovered to the time of commencing suit therefor. Subsequent damages for a continuance of the trespass give a new right of action.
4. The plaintiff in this case was not entitled to have included in the verdict, as part of his damages, the outlay he made for the purpose of planting and cultivating land which he knew was then overflowed.

Charge of Court. Prescription. Trespass. Damages. Before Judge SCHLEY. Chatham Superior Court. January Term, 1872.

Benedict Bourquin brought case against the Savannah and Ogeechee Canal Company, claiming \$20,000 00 damages, upon the following statement of facts :

He had been for many years the owner, and in the actual possession, of a plantation in the county of Chatham, through which is constructed the Savannah and Ogeechee Canal. Before and during the war, he had planted rice on about seventy-five acres of the land. His planting operations were suspended after the capture of Savannah, until 1868. In the spring of that year he resumed his planting, or attempted to do so, hiring hands, building houses, buying mules, utensils and implements, expending therein about \$3,500 00. He found, however, upon entering more fully on his work that owing to certain leaks and breaks in the canal bank, and on account of a want of repair of said canal, the water from the same overflowed his fields and prevented him from preparing his land for cultivation, and compelled him to give up the hope of making a crop. He, however, called the attention of the president of the canal company to the overflow, and requested that it be put in repair and the overflow stopped. His demands were unheeded, and, although he had repaired

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his own dams, and the dams that at all times before and during the war had served to keep back the waters of the canal, and had used all the precautions that heretofore had been sufficient to protect him, he was unable to prevent the overflow, and finding it impossible to plant his land, and his repeated applications for relief to the company being unheeded, he brought his action for damages. The defendant pleaded not guilty.

The evidence was, substantially, as follows :

Gugie Bourquin sworn, says: His father had been in possession of the lands for forty years before suit brought. The principal crop planted on the place was rice. In 1868 his father prepared to plant these lands, buying mules, farming utensils, building houses, etc. Nothing planted on account of the water running from the canal. Reported the condition of the land and the water to Mr. Blair, the president of defendant. He gave him no satisfaction. Several culverts on the canal. One mile above the plantation of plaintiff is the eight mile lock. On this level the water is six feet higher than on the adjoining level. It overflows at the lock and runs through the swamp and a culvert under the canal, on to the rice field. Bought three mules at \$150 00 each; cost of feeding them was about \$15 00 or \$20 00 per month; hire of hands to take care of them \$20 00 per month and rations. Had eleven hands at work that season at thirty-five cents a day and rations; made arrangements with other hands, but as they did no work, paid them nothing. The plantation could not have been covered with tide-water. The value of the place not overflowed would be about \$10,000 00. Would give \$5,000 00 himself. Seventy-five acres of rice land under bank. Such land rents for about \$10 00 an acre per annum. Of the three mules bought, plaintiff has two now. One was sold for \$100 00 or \$150 00. The other two have been used in ploughing and working the place. Two or three of the negroes remained during the season; the rest went away. Some of them were paid, but cannot say how many. Those who remained planted corn and several acres of rice on the high land, and also planted

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some low land. Witness superintended the management of the place for his father for no pay. Mr. Blair's attention was called to the condition of the water in the latter part of February. Then a part of one square had been burnt off. Witness said he had stopped the break in the check dam three times. It was through this dam that the water came into the rice fields. This was the first attempt to plant rice since the war. The place had been planted up to the time of the surrender. About six or seven hands were on the place at the time of the first break. The ditches had not been cleaned out. Would have given \$5,000 00 for the place. Thinks he paid out for hands, implements, mules and horses, about \$3,500 00. There had been very heavy rains. Would have cost about \$150 00 to repair the check dam, so as to keep the water out. In 1867 he repaired a break in check dam. This dam was to keep the back-water from the canal. The swamp would have a great deal of water after heavy rains. The breaks in the check dam and in the canal have been there a very long time; cannot say how long. The canal at Raspberry swamp had a break of thirty feet in length. It was leaking badly below eight mile lock. Through the break at Raspberry swamp the water of the canal was running and overflowing the low country between Rapsberry swamp and the back-water. Told Mr. Blair he desired to hold a survey of water, and he refused to appoint any one on the part of the defendant. In 1868 was unable to ditch the land in consequence of the water in the field, caused by the flow of water from the leaks and breaks in the canal bank. The back-wa-ter dam was mended three times during 1868. Never knew the water from Raspberry swamp to interfere with planting until after the war.

Samuel B. Sweat, sworn, says: Was engineer and surveyor; the water that runs through the break at Raspberry swamp flowed into the back-water; the bank has been open a very long time; some years ago the canal was in disuse; a good head of water is kept on now; saw a leak once about a mile and a half beyond what is known as "Bourquin's bridge;"

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very little water passed through, as a bank had been fixed around this break outside of the canal bank ; Raspberry swamp is a basin, and the canal runs through the centre; its waters would naturally flow into the canal, but if the water in the canal should be raised, the swamp water would be backed and some of it flow through Mr. Bourquin's rice field; thinks the water in the canal has been raised about eighteen inches since the war ; the opening in the canal at Raspberry swamp has been there at least thirty years to witness' own knowledge ; seems to have been left open to flow Raspberry swamp ; has no recollection of the check dam mentioned by Mr. Bourquin, and laid down in the drawing ; if the opening in the canal bank were closed up, there would be no way for the water to escape, except by evaporation.

FOR THE DEFENSE.

..... Dotson, sworn, says: Raspberry swamp has always been kept as a reserve, same as Little Ogeechee river ; the natural course of the water from Raspberry swamp is towards Owens' in the direction of the Ogeechee river ; have seen the rice fields in question for the last fifty years ; the main ditches have not been cleaned in many years ; no water can pass or flow through them as they now are ; they were in the same condition in 1868 ; water gets in and out of the back-water, from the ditches on the other side of the canal, from the rice field, which ditches carry the water off to some ponds ; these ditches have not been cleaned out ; they are choked up ; if they had been clean the land would not have been overflowed ; Mr. Bourquin's land is nothing but a pond ; if the canals to drain the water from the fields had been cleaned out, the land would have been dry enough to plant corn ; the overflow of the rice fields was not caused by the canal ; it was occasioned by the bad condition of the dams and ditches owned by Mr. Bourquin, and on the Dean Forest place, adjoining and below Bourquin's fields ; have been on Bourquin's place every year for forty years ; was in his rice fields in 1868 ; if Bourquin planted rice in 1864, he must have made a very

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small crop; have passed through the swamp on his horse, but do not remember the exact time.

G. T. Burdett, sworn, says: Knows location; the water passed over his lands before reaching Bourquin's; Raspberry swamp is a reserve and feeder to the canal; the water in it is as high as the top-water in the canal; does not think there was much water on Bourquin's land in 1868 which came from Raspberry swamp, because I used a path through the low land all the time; the back-water is a pond; all the swamps around drain into it, and if the ditches which carry the water off had been in good condition there would have been no overflow; if there was no canal there would be more water in Raspberry swamp, as the canal takes a great deal of water from it; has passed the break at the check dam lately; very little water was running through it at the time; could have taken more out with a pitcher; the rice fields and ditches have been growing up since 1845; if the ditches had been in repair the water could and would have run off the land; the ditches have been getting worse ever since he can remember; the land could be planted in corn if the ditches in the fields and at Dean Forest were clean; land in that neighborhood is worth about \$4 00 or \$5 00 per acre; in 1868 the canal was in good order.

Abraham Sheftall sworn, says: Canal in perfect order now, and was also in 1868. Travel the canal two or three times a week; have been employed for fifteen or twenty years to keep and regulate the water in the canal; the water is always under control; it is kept by a level, and was not raised in 1868, nor has it been since he has been in charge of it; has been on the canal for twenty-five years. Bourquin planted rice with the opening in Raspberry swamp just as it is now; the water was held on Bourquin's land by reason of the bad condition of his ditches in his rice field, and that lead to and from the back-water and his dams. The water from Raspberry swamp runs through Mr. Owens' place, and passes out in that way. If the back-water dam had been in good order, the water could not have flowed the land; \$5 00 per acre would have

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been the market value of the land in 1868, and \$6 00 now. The water in the canal keeps to one standard, and has been so for years, before, during, and after the war.

Francis P. Blair sworn, says: Was president of canal company in 1868 ; canal then in good order ; great many hands employed in that year, and much money expended to keep sides and banks in good order ; great deal of rain fell in 1868, hardest rains known for forty years ; opening at Raspberry swamp always been there, kept as reserve—been so for over twenty years to his knowledge ; has marks on the canal so as to keep the water at the same level. The water has not been raised since the war ; we could not raise it a foot if we wanted to. Water is kept at one level by letting it run into the Savannah river when too high.

Tax digests of Chatham county put in evidence, and showed returns of Bourquin of his lands in Chatham county, as follows: In 1867, five hundred and eighty acres, value \$2,000 00; in 1870, six hundred acres, value \$2,000 00.

The jury found for the plaintiff \$2,500 00. The defendant moved for a new trial upon the following grounds, *to-wit*:

1st. Because the court erred in refusing to charge as follows : "If the jury find that the defendant is guilty of an infraction of the public duty imposed upon it by law, in not keeping its banks and sides in the condition required by its charter, and that the plaintiff suffered special damages thereby, and you further find that the plaintiff, by ordinary care, such as by keeping his dams in repair and his drains clear and fit for use, could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover," and in giving the charge with this qualification : "If in the ordinary tillage or proper administration of his rice fields, the plaintiff failed to keep his drains open, so that all ordinary flow of water from this swamp or reserve could be discharged from his fields without injury, then he cannot recover damages for the neglect of the reasonable duty imposed upon him, as plaintiff is bound to use such diligence and care as an ordinary and prudent man would exercise in carrying

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on his planting interests ; but if you find from the testimony that the volume of water has been increased in height or quantity by the neglect of defendant in not keeping the canal in proper order, and by reason thereof such an increased overflow takes place, that plaintiff's drains, when kept in proper order, would not vent it, then the defendant would be liable to such damages as he has proved he suffered."

2d. Because the court erred in refusing to charge in the following language: "If you find that the plaintiff was damaged by the negligence of the defendant to keep its banks and sides in repair as required by its charter, and that the plaintiff could not by ordinary care have avoided the consequences to himself, then the proper measure of damages would be the difference in the market value of his property before the injury, and its market value after the injury," but added thereto, "or a fair rental per annum from the date of the overflow until the time of trial, and the outlay by plaintiff."

3d. Because the court erred in refusing to charge as follows: "That if the jury find that Raspberry swamp was left open for more than twenty years as a reserve for the canal, it was not the duty of defendant to build the bank there in 1868," but modified the charge by adding thereto the following: "unless such changes have been produced in the canal by the neglect of the defendant to keep it in the same condition it was when originally built."

4th. Because the court erred in refusing to charge in the following language: "If the jury find that Raspberry swamp was left open for more than twenty years, and should further find that the damages were occasioned by the increased quantity of water in the canal which escaped through the opening, the plaintiff cannot recover in this case which is for a failure to amend and repair its sides and banks ; to entitle him to recover in such case, that act of trespass should be set forth in the declaration," but charged as follows: "If you find that at the time the canal was constructed (and that it was more than twenty years since,) that Raspberry swamp (as a reserve or feeder) was made and has been kept in the same or as good con-

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dition now as then, then the plaintiff is not entitled to recover any damage that flows from the reserve or swamp, unless the testimony discloses that by the neglect of the defendant the canal became foul and in a worse condition, and by reason thereof caused a backing up of the water, raising the water line so much higher, as to cause more water to flow out of the swamp or reserve than did when the canal was kept in proper order, then for such failure or neglect the defendant would be responsible for such damages as plaintiff has sustained by reason thereof. As to the distinction made by counsel that because the declaration says failure to amend sides and banks, the court charges "that if the bottom should be allowed to get foul or fill up so as to cause the water to rise higher in the canal, and were water to flow through the swamp or reserve so that the plaintiff's drain could not, under the ordinary flow vent it, then for such neglect of defendant to keep the canal in proper condition, it would be responsible for the damage caused, as the bottom is as much a part of the canal as the sides."

5th. Because the court erred in this: plaintiff's counsel requested the court to charge, "If the jury find that the plaintiff could not repair his ditches by reason of this overflow, he is entitled to damages;" and the court said, "So I charge, provided his drains were kept in proper order and would vent the flow."

6th. Because the court erred in charging, as requested by plaintiff's counsel, in the following language: "That if the jury find that there was a greater flow of water at the time of the injury complained of and since, then the right to have a less amount of water pass through this break is no justification," and adding thereto, "that they must find that there was an excess of water caused by the canal not being kept in proper order and raising the water higher."

7th. Because the court erred in charging the jury, "that if they found from the testimony that any damage has resulted to the plaintiff by reason of the omission or commission of any act on the part of the defendant necessary to keep its

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canal in proper order, then the plaintiff is entitled to recover."

8th. Because the verdict was contrary to law and the evidence.

The motion was overruled, and defendant excepted upon each of the aforesaid grounds.

HARTRIDGE & CHISOLM, for plaintiff in error.

J. R. SAUSSY ; JOHN O. FERRILL, for defendant.

TRIPPE, Judge.

1. We do not propose to take up *seriatim* the various grounds in the motion for a new trial, but to give such directions as to the main questions involved that the case may, on a new trial, be relieved from any errors of a material character which may have been committed. The action was for damages caused by the defendant's keeping the sides and banks of the canal in a bad and ruinous condition, for want of necessary mending and repairing of the same. There was no evidence, so far as the record discloses, that the bottom of the canal had become foul or filled up. The charge of the court, therefore, on that point, and as to the damages resulting from that cause, was without evidence to authorize it. The other charge, that if the jury found that any damages had resulted to plaintiff by reason of the commission or omission of any act of the defendant to keep its canal in proper order, the plaintiff is entitled to recover, is too broad and general for the pleadings. Indeed, it would be difficult to prepare the pleadings so that they would authorize such a sweeping charge against any kind of negligence : 1 Chitty's Pl., 381, 392.

2. It was claimed, in behalf of the canal, that as it had an opening in its side in Raspberry swamp for supplying the canal with water from the swamp, as a reserve, and that it had been so used for more than twenty years, and that during that period there had been at certain times or whenever the water was up in the canal, an outflow of water through the opening into the swamp, and from it over the adjoining

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lands, that a prescriptive right to such outflow had been acquired, or, in other words, it had an easement by prescription in the adjacent lands, so that it had the legal right to overflow them. Granting the legal principle involved in this proposition, still it would confer no right on the defendant to increase such outflow either intentionally or by negligence, so that it would cause the water to escape from the swamp in such quantity that it would submerge the land of an adjacent proprietor which had not been theretofore overflowed. If one acquires, by prescription or grant, the right to divert a stream so that it covers an acre of his neighbor's land, he does not thereby get authority to connect another stream with that, and cover two acres, or by thus increasing the water in the new channel to cause the overflow of the land of another neighbor. The right gained is limited to the extent to which it has been used. One may have the privilege of letting the water run off a building of fifty feet in length on another's lot, but he cannot claim from that the right to extend his building to one hundred feet, and thus double an easement in his neighbor's property. Because he has had the *cloak* long enough to give him title to it he cannot, therefore, by law, *demand the cloak* also. This rule is thus stated in Gale & Whatley, on Easements, page 330 : "As every easement is a restriction upon the right of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant tenement, the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had."

3. As to the measure of damages in cases of a continuing trespass, such as overflowing one's land, the authorities are almost uniform that it is limited to those which have occurred before action is commenced, and that subsequent damages flowing from a continuance of the trespass give a new right of action: *Robinson vs. Bland*, 2 Burr. 1077, 1086; *Duncan vs. Markley*, Harper's Reports, 276; *Blount vs. McCormick*, 3 Denio, 283; *Pierce vs. Woodward*, 6 Pick., 206; 3 Black-

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stone's Commentaries, 220; and 2 Espinasse, N. P., page 269, where it is stated that it is not necessary to the justice of the case to include subsequent damages, because the plaintiff may bring his action *toties quoties*, he may sustain an injury: See, also, Langford *vs.* Owsley, 2 Bibb, 215; Wilcox *vs.* Plummer, 4 Peters, 172-182; 3 Comyn's Digest, 343. The case of Duncan *vs.* Markley, *supra*, is identical with this case in principle, as that was for damages to one man's mill caused by the dam erected by another for his mill. Loss or damage accruing subsequent to the suit may be recovered where they are the mere incident or accessory of the principal thing demanded, and another action could not be maintained for them, or, as Lord Mansfield expresses it, 2 Burr, *supra*, "where no satisfaction can be had for them by a new suit." And in trespass for breaking plaintiff's leg it was held proper to show the probable future condition of the limb: 23 Wendell, 425. In such cases as this latter and similar ones, there is no question but that all the consequences of a single act of trespass which constitutes damage, may be proved.

The court, then, we think, was in error when it charged the jury that plaintiff "might recover a fair rental per annum from the date of the overflow until the time of trial." Loss or damage accruing after the action was brought could not be recovered in this suit.

4. The court also charged that the plaintiff could recover for the "outlay" by him. We understand by this it was meant that the plaintiff was entitled to recover for the whole expenditure incurred in 1868 in building houses, buying mules and feeding them, and for the hire of hands, which were not used or worked on the place on account of its being largely under water. From the testimony on this point, as it is given in the record, it would be almost impossible to say what, if anything, was the loss of plaintiff on that account. Young Mr. Bourquin states that "three mules were bought at \$150 each; cost of feeding them was about \$15 00 or \$20 00 per month; hire of hands to take care of them \$20 00 per month and rations. Had eleven hands at work that season at thirty-

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five cents a day and rations." He further says: "Of the three mules bought, plaintiff has two now. One was sold for \$100 or \$150 00." The plaintiff testified, "that in the spring of 1868 he resumed planting, or attempted to do so, hiring hands, building houses, buying mules, utensils and implements, expending therein about \$3,500 00." He then adds that he was compelled to give up the hope of making a crop, on account of want of repair of the canal, and that owing to certain leaks and breaks in its banks the water overflowed his fields and prevented him from preparing his land for cultivation." Neither of the witnesses state how much of this expense was a loss on account of not cultivating the overflowed fields. It certainly was not the whole \$3,500 00, for one of them states that eleven hands were worked that season. Nor was the defendant liable for what was paid for the purchase of the mules, or building the houses, unless they were worthless to plaintiff. He sold one of the mules—still has two, and the houses, and, doubtless, the utensils and implements, and also had the work of all the hands he seemed to have paid for and fed. Other hands who did no work were paid nothing. The charge of the court, taken literally, would have given the plaintiff his whole "outlay" for all these things, even if no loss or damage resulted from their non-use. Even had the court put the proper limitation on his charge, and the pleadings had authorized it with such limitation, there were not sufficient *data* to ascertain what proportion of the expenses so incurred was a loss to plaintiff by reason of the default of the defendant.

It may be added that if the plaintiff knew at the time such outlay was made that his land was submerged so he could not cultivate it, he could not tax defendant for his loss resulting from the expenses paid out by him.

We think a new trial should be granted, and another investigation had.

Judgment reversed.

Buck & Spencer *vs.* Collins.

BUCK & SPENCER, plaintiffs in error, *vs.* **JAMES D. COLLINS**, clerk, defendant in error.

A private citizen has not a right, against the consent of the clerk of the superior Court and without the payment of his fees, to examine the books of record in his office, for the purpose of making a full abstract of the contents thereof, for publication.

Injunction. Officers. Clerk of the Superior Court. Before Judge HOPKINS. Fulton county. At Chambers. March 28th, 1874.

Buck & Spencer filed their bill against James D. Collins, making, in brief, the following case:

They have associated themselves in business for the purpose of making full abstracts of the title to the various parcels of real estate situated in the county of Fulton, embracing the city of Atlanta, for the use of the public, and for the private benefit of complainants. In pursuance of this enterprise they employed one E. D. Atwater to commence the preparation of said abstracts, at the compensation of \$100 00 per month. The principal source of information for executing and perfecting the said enterprise consists of the records of deeds, mortgages, etc., contained in the clerk's office of the superior court of said county, and in the possession and control of the defendant, who is the clerk of said court. An inspection of said records can be made by complainants' agent without interfering with the duties or rights of said defendant or any other person, and without damage to the books, save that resulting from ordinary use. Recently, within office hours, on a day other than a Sunday or holiday, complainants went into said clerk's office and commenced inspecting the records for the purpose aforesaid, when they were directed by the defendant to desist, and he refused to allow them the use of the books. At other times since, complainants have requested said defendant to allow said inspection to proceed, offering to pay to him all lawful fees, if there were any, to which he might be entitled by reason of such use of the books, but he has invariably refused.

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Pray that the said defendant, clerk as aforesaid, may, by the writ of injunction, be restrained from obstructing complainants or their agents, from inspecting the records aforesaid during office hours, and on business days, and for general relief.

The defendant, by his answer, denies that said records can be searched and overhauled, day after day, without interfering with the rights and duties of defendant, and without infringing on the rights of any other person, and without any injury to the books save that resulting from ordinary use. Denies that the inspection authorized by law is such as is pursued by complainants or their agent, or that it will suffice to give to complainants the information which they need in the preparation of correct abstracts of title. Asserts that while he does not gainsay that complainants are able to make all such inspections as they may need without the aid of the defendant, yet he does deny their right to make extracts from said records, or even to inspect the same, without paying to him twenty-five cents for each inspection. He insists that the right to inspect does not carry with it the right to make extracts, and he charges that this is precisely what complainants' agent was doing. He asserts that the making of extracts is an exclusive privilege appertaining to his office, for which the law allows him compensation at the rate of ten cents per hundred words, and that the complainants were wrongfully depriving him of this perquisite. Denies that complainants offered to pay the fees, and says that whilst he was, and still is, willing to permit such inspection upon the payment thereof, yet the public records should not be subjected to the wear and tear of a long and continuous ransacking, simply to afford to complainants the opportunity to carry out a private enterprise. Says that even if his fees had been tendered to him, which they were not, he would have had the right to object to the use sought to be made of said records, for the reason that the law requires that he "shall keep all books, papers, dockets and records, belonging to his office with care and security," and it would be impossible for him to comply with the terms

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of this statute, should complainants be permitted to pursue the course heretofore referred to.

Previous to the hearing of the application for injunction, it was agreed between the parties litigant, that all objections to the form of the remedy adopted by complainant, be waived; and that the chancellor decide upon the merits of the controversy.

The injunction was refused and complainants excepted.

E. N. BROYLES, for plaintiffs in error.

CANDLER & THOMSON, for defendant.

MCCAY, Judge.

The complainant claims to have the legal right to go into the office of the clerk of the superior court, (who is also the recorder of deeds and mortgages,) and make from the books an abstract of them; and as he does not need any aid of the clerk in making this abstract he insists that he is entitled to do it without the payment of any fees. This right is claimed not only on general principles, but it is said exists by positive law. Section 14 of the Code declares that all books kept by any public officer shall be subject to the inspection of all citizens of this state, within office hours, every day except Sunday. The fee bill, Code, section 3695, provides fees for inspection and abstract as follows :

For each inspection, when the clerk's aid is required, twenty-five cents ; for examination of books and abstract of result, \$1 00.

Under these laws, the complainant insists that he has a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, copy from the books, when they are not in use, at his option, and thus collect material for a book which he proposes to publish for sale. As he is able, by employing an expert, to do this inspection and compilation himself, without the assistance of the clerk, he insists that no fee is required, and as the clerk

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refuses to permit him to go on with his enterprise, except upon the payment of a fee for each separate investigation of a title, he prays that the clerk may be enjoined. We agree with Judge Hopkins. We think the complainant has no such right as he insists upon.

In the first place, we doubt if the avowed object of the complainant is not a perversion of the purpose for which the books are kept. The necessities of society and the protection of those dealing with property, require that these records shall exist. That the title to land, the fact that mortgages or judgments exist, shall be capable of being inquired into by those interested. This is, as we have said, a necessity of society, and this necessity begets the necessity for books and records. The character of one's title, and whether one has mortgages or judgments against him, is thus of *necessity* open to inquiry, and the public, by providing books and records, meets this necessity. Men are required, for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, what they may have strong inducements to keep secret. But while the public interest thus provides a mode by which any one may learn the truth upon *inquiry*, it is no part of the public scheme to make this exposure universal. It provides that those who seek the information can get it, but it does not and ought not to flaunt the information its records contain before the public gaze, and thus make a scandal of a public necessity. The object of the record is to furnish to those *needing* it the information the record contains. That object is attained when its books are open to inquiries as these occasions present themselves. The object sought by the complainant, to-wit: to put the substance of these records into print, to be sold and put in the hands of any one who may chance to buy or to borrow, is an extension of this publicity beyond the necessities which make the record justifiable, and is a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze.

But again, the claim of the complainant to inspect and

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make abstracts of the clerk's books without the payment of fees, as he proposes to do, is not fairly within that part of the fee bill, which, by implication, permits any citizen to make an inspection without fee if he does not require the clerk's aid: Code, section 3695. All laws are to be reasonably construed in view of the object of them, and in view of other laws. The object of this permission to *inspect*, without fee, if no *aid* is required from the clerk, is plain. It is contemplated that lawyers, public officers and persons familiar with the books, by having frequent occasion to use them, may not need the clerk's assistance for the purpose. And, by implication, this permission contemplates that the clerk shall in such cases make no charge for simply standing by and noticing that no improper interference with the record is had. But there is nothing in this implication (and that is all it is at best) which authorizes the clerk to permit even an inspection except in his own presence, or in the presence of his sworn deputy. He is required, section 267, Code, to "keep all books, papers and dockets belonging to his office with care and security." He *cannot* do this if any person may handle or inspect them otherwise than under his own eye. In our judgment any clerk would be guilty of a failure in his official duties should he permit any person, if only for a minute, though he might be familiar with the books, and be able to examine them without the clerk's aid, to have the custody of the books and papers of his office. The clerk cannot charge a fee for a mere inspection, where his aid is not required. But no person has a right to examine or inspect the records of his office, except in his, the clerk's, presence and under his observation. If he may do this for a minute, the clerk is not "keeping them safely and securely." A blot or a scratch may be made in a minute that may alter a record; a leaf may be abstracted in a minute, and if one man may of right take a record book and "abstract" its contents—work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and if this may be done, except under the clerk's immediate inspection, no record can

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be kept safely. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, and from day to day, until his book is finished. He has the right to the services of the public officer for months together without pay; for, not only the law but every principle of propriety requires that no person shall inspect the books, except under the watchful observation of the clerk.

It is a perversion of the right of inspection, evidently intended to provide for examinations from time to time, as the ordinary occasions and business of men may require, to make a business of it. The law might well, in view of the ordinary wants of the people, permit an inspection of the books, when no aid is required from the clerk, without a fee. It is but a slight hindrance to him in his duties to keep his eye on the few citizens who visit his office for such purposes, and if he has only to stand by as a sentinel to prevent fraud or spoliation, for a minute or two, it is but a small matter, and may well be without a fee. But the law never contemplated that any one would make a business of it; spend days and weeks in the office, engaged in an occupation which, in our judgment, cannot lawfully be carried on except under the immediate observation of the clerk. Fees are given for *each* inspection, *each* abstract. The law has in view the inspection of one chain of title—the *status* of one man—and fixes a fee for that. If the inspection of the book does not require the aid of the clerk, he can demand no fee, but it is still his duty to inspect the inspector. In our judgment the rights claimed by the complainant thus to occupy the attention of a public officer, perhaps for weeks together, without fee or reward, is a perversion of the letter of the law, intended for one purpose, to another and different purpose not contemplated by the law-makers, and contrary to their intent. It stands exactly on the footing of the misconstruction mentioned by Blackstone, when it was concluded that because it was unlawful to draw blood in the streets, a surgeon was a law-breaker who bled a man found helpless therein. If some one familiar with the

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clerk's office, say an old clerk or a lawyer, whose business required him often to examine the books, were to make a business of it, and sitting at the clerk's door solicit every inquirer to give him the job, he would be no more a perverter of the law and infringer on the rights of the clerk than this complainant proposes to be.

The avowed object of the complainant is to furnish to the public the contents of the books and papers of the clerk's office for his own profit. He proposes to say to the public, if you desire to inquire into a title or into the incumbrances upon an estate, or into the judgments against a citizen, you need not visit the clerk's office, you need not pay him any fees. Here is my book—it is all there; you can get what you want without fees.

Our law gives the clerk no special fees for keeping safely the books, etc.; the pay he gets for this service—this duty—to be always on hand watching his books and keeping them ready of access, is the fees which, in the ordinary course of business, he will receive for inspections, abstracts, etc. The scheme of the complainant strikes at the very root of this lawful perquisite of the clerk and takes away from him those fees which the law contemplates he will receive for the performance of a duty cast upon him.

Upon the whole, therefore, we think the judge was right in refusing the injunction. The plaintiff's whole scheme is of doubtful propriety, proposing, as it does, to make unnecessarily public men's private affairs, which the law, for the purposes of fairness, requires them to put upon record where citizens may, as their necessities require, examine. It proposes to use a privilege, intended only for special cases, in such a way as to put an onerous and exacting duty upon the clerk without remuneration, and to take away from him, as far as it is possible for the scheme to do it, the lawful perquisites of his office.

Judgment affirmed.

Sizemore vs. Pinkston.

GEORGE W. SIZEMORE, plaintiff in error, *vs.* **B. P. PINKSTON**, defendant in error.

1. A plea which sets up that the note sued on was given for a tract of land, for which the plaintiff executed his bond for titles, in the usual form, to the defendant; that the plaintiff had no title to the land and is insolvent; and which offers to deliver up to be canceled the bond, and prays the rescission of the contract aforesaid, is not demurrable.
2. The defendant can obtain the same relief in a court of law, as to the rescission of the contract, as he could in a court of equity, and have the verdict so moulded as to compel the defendant to surrender the possession of the land, and to place the parties in the same condition in which they were before the contract was made.

Equity. Vendor and purchaser. Plea. Verdict. Before Judge JAMES JOHNSON. Stewart Superior Court. October Adjourned Term, 1873.

For the facts of this case, see the decision.

M. H. BLANDFORD, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

Pinkston, the plaintiff, brought his action against the defendant on a promissory note, payable to him or bearer, for the sum of \$450 00, dated 16th December, 1871, and due 25th December, 1872. The defendant filed his plea to the plaintiff's action, in which he alleged that the note sued on was given for the purchase price of a certain described tract of land, that the plaintiff executed to defendant his bond in which he obligated himself to make good and sufficient titles to defendant for said tract of land, upon the payment of said purchase money; that the plaintiff, at the time of making bond, did not have a title to said land, and has not now the title to the same, but that the title to said land is in the estate of Jane Prather, deceased, and was at the time the plaintiff sold the land to defendant, which was well known to plaintiff, but he fraudulently represented to defendant that he was the owner of said land and had the title to the same, and

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defendant, believing said representations were true, purchased the land and gave the note sued on, and took plaintiff's bond for title as aforesaid; that plaintiff is *insolvent*, and if defendant is compelled to pay the purchase money for the land he will be wholly without remedy against said plaintiff. Wherefore the defendant prays that said contract be rescinded and set aside, and defendant offers to deliver up and cancel said bond. At the trial of the case the plaintiff demurred to the defendant's plea, which demurrer was sustained by the court, and the defendant excepted.

Assuming the allegations in the defendant's plea to be true, there can be no doubt that he would be entitled to relief in a court of equity, as was held by this court in *Coffee et al. vs. Newsom*, 2 *Kelly's Reports*, 442. According to the provisions of the 3082d and 3562d sections of the Code, the defendant can obtain the same relief in a court of law, as to the rescission of the contract, as he could have done in a court of equity, and have the verdict so moulded as to compel the defendant to surrender the possession of the land, and place the parties in the same condition they were before the contract was made, in the event the contract should be rescinded and set aside on the ground of the alleged fraud, and the other facts alleged and set forth in the defendant's plea; and this being so, we think the court erred in sustaining the demurrer to the defendant's plea.

Let the judgment of the court below be reversed.

**BENJAMIN A. STORY, plaintiff in error, *vs.* MORGAN KEMP,
administrator, defendant in error.**

A plea to an action by an administrator, on a note given him for land bought by the defendant at administrator's sale, that the heirs-at-law were alone interested in the note, and that after the sale the heirs-at-law had brought suit against the defendant for the land, and put him to great expense in defending the suit, is not a good plea in defense of the suit on the note, and it was not error in the court to strike it on demurrer.



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Administrators. Pleadings. Before Judge JAMES JOHNSON. Marion Superior Court. April Term, 1873.

Morgan Kemp, as administrator upon the estate of John Kemp, deceased, brought complaint against Benjamin A. Story, on a due-bill for \$1,000 00, dated March 5th, 1870, with a credit thereon of \$100 00, of date January 7th, 1873. Amongst other pleas, the defendant filed the following :

That the heirs-at-law of John Kemp, deceased, are alone interested in the note sued on ; that said note was given for certain lands sold by the plaintiff as the property of the deceased ; that said heirs-at-law instituted an action of ejectment against the defendant for the recovery of said lands, whereby he was compelled to expend the sum of \$500 00 as attorneys' fees in defending said suit, which amount he pleads by way of set-off and recoupment to the note.

Upon demurrer, this plea was stricken, and the defendant excepted.

M. H. BLANFORD; E. H. WORRILL, for plaintiff in error.

B. B. HINTON & SON, by MARTIN J. CRAWFORD, for defendant.

McCAY, Judge.

Admitting, what does not, even under our liberal system of administering equitable relief at law, very clearly appear, that any defense good against the heirs would be good against the administrator, we still think the judge was right in dismissing this plea. The substance of it is, that the heirs have damaged the defendant by bringing an action against him to recover the land for the purchase of which the note was given. There is no breach by them of any contract, express or implied, alleged. The administrator's sale was not a sale with warranty, and so far as we can see, there was nothing in the sale by virtue of which it was even implied that the heirs should not sue for the land. Recoupment is allowed when

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the defendant has got damage because of the failure of the plaintiff to comply with some obligation on his part, either express or implied, in the contract, for the enforcement of which the suit is brought. Admit that the sale passed all the title the ancestor had. But suppose the heirs had thought the sale was for any reason void; suppose they had the belief that the sale was fraudulent, that there was complicity between the administrator and the purchaser; suppose they had thought there was no order to sell, or that it was improperly obtained, and that they had a right to treat the sale as null and sue for the land, must they do so under the condition that if they fail they are liable to pay to the purchaser the expense and trouble they may put him to under some supposed contract made for them by the administrator by the very fact of sale? We see nothing of such a *contract*, either by virtue of any deed that the administrator could make or by reason of the nature of the transaction. To sustain this plea, the defendant's rights must grow out of a contract express or implied, since a tort cannot be set off against a contract. The most that can, even in abstract justice, be contended for by the defendant is, that as the heirs have damaged him by bringing a suit against him, in which they failed, he has an action on the case against them for the damages.

But does not the law furnish the measure of damage for such a suit in ordinary cases, to-wit: the costs? Could justice be said to be free if every suitor was to be subject to damage if he failed in his suit? By ancient custom every suitor failing in his claim is liable to be mulct in the costs of his adversary as well as his own, but this is the farthest that has ever been allowed for simple failure. In England this included *attorney's cost*, fees allowed by law to them as officers of court. But our law has abolished such fees and costs, and in doing so has furnished no means by which the defendant is to be reimbursed for counsel fees in ordinary cases. If it could be shown that a suit was frivolous and malicious, an action on the case might lie. In some cases our statutes allow damages where either party acts merely to delay the other,

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and this is, doubtless, in analogy to the action on the case for a frivolous and malicious suit.

This right is no hindrance to a wide open door of the courts, since freedom of access is perfectly consistent with a penalty if this right be abused causelessly and frivolously and in bad faith. Under the facts set forth, even a right of action on the case is not made out, since the fundamental element of an action for bringing a suit is not charged, *to-wit*: that the suit was frivolous and malicious. Perhaps it was brought in good faith under a mistake or misapprehension of law and fact. We think there is no law, and ought to be none, giving an action on the case for damages for such a suit. Such a law would be a bar to the "open court," provided for by the constitution, and be bad public policy.

Judgment affirmed.

THOMAS O. JACKSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. If a jury in a criminal case be impaneled, and before any evidence is submitted the solicitor general discovers that one of the jurors was of the grand jury that returned the bill, the court may, under section 4681 of the Code, withdraw such juror, unless both sides consent to waive the objection, and if the other juries have been discharged, may continue the case.
2. To constitute the offense of an assault with intent to murder it must appear that the circumstances connected with the assault were such, that had death ensued the accused would have been guilty of murder.
3. A defendant was charged with committing this offense upon an officer whilst engaged in arresting one M. The accused introduced witnesses who testified that M. had surrendered and laid down his knife, and that the officer immediately called in others, who entered the room, some with pistols, and upon M.'s taking up his knife, but making no advance, the officer struck him immediately several blows on the head with a heavy stick, which would, in the language of the witness, "have killed a man or a mule," and that the accused, under these circumstances, shot the officer. The court charged the jury that if the officer, in the execution of his authority, was obstructed or interfered with by the defendant, and in this interference the defendant did make the

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assault with intent to kill the officer, it would have been murder if the officer had died, unless you believe that the defendant had some provocation other than is set up in this case:

Held, that the legal effect of the charge was to wholly withdraw from the consideration of the jury the evidence submitted by the defendant, and it tended, in connection with another part of the charge, to impress the jury, that no matter what degree or character of violence may have been committed by the officer on M., the defendant was guilty of the offense charged. Though there was strong counter-evidence on the part of the state, the court should have left it to the jury to determine if they were satisfied from the evidence that the accused had reasonable grounds to believe that the life of M. was in serious danger, and shot to prevent him from being unlawfully killed, whether those facts did not affect the question as to malice on the part of the defendant, so as to mitigate the offense of which he may be guilty.

Criminal law. Jury. Assault with intent to murder. Officers. Before Judge POTTLE. Hancock Superior Court. October Term, 1873.

Jackson was placed on trial for the offense of assault with intent to murder, alleged to have been committed upon the person of one James M. Achord, on December 28th, 1872. Upon arraignment the defendant pleaded specially in bar as follows :

At the last term of the court the defendant was placed on trial for the same offense and upon the same indictment upon which he is now arraigned, when he waived arraignment and filed a plea of not guilty. After the case had been submitted to the jury, the solicitor general, without the consent of the defendant, took the following order :

"It appearing to the court that James Bass, who was qualified as a juror in this case, served upon the grand jury which found the true bill, it is, upon motion of the solicitor general, ordered by the court that the case be withheld from consideration by the jury, and continued for trial."

This order was duly entered of record on the minutes of the court, thereby denying to the defendant the right to have said jury, to whom his case had been regularly submitted for trial, make a verdict in the same. He therefore pleads the

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facts aforesaid in bar to the further progress of the case, and prays that he be discharged and acquitted of the said offense.

Upon demurrer, said plea was stricken, and defendant excepted.

It appeared, by admission of counsel, that at the time the aforesaid order was taken, all the juries had been discharged except the one impaneled to try this case, and that said order was taken in the presence of the defendant and his counsel, and without objection from either.

The defendant pleaded not guilty. Upon the trial of the issue thus formed, substantially the following evidence was introduced :

James M. Achord, sworn : The defendant made an assault upon him in Hancock county, at Mr. Johnson's grocery, on December 28th, 1872. He shot witness with a pistol, the ball lodging in his arm, near the left elbow. This shot was fired whilst witness was fighting with McCook, and whilst his back was towards defendant. Witness then turned towards defendant, when he fired a second shot which struck witness in or near the knee of his left leg; defendant started to run after firing the second shot, witness following him to the door of the grocery ; he had had no words or difficulty with the defendant prior to the firing of these shots ; when witness entered the grocery, a man by the name of McCook, was in there singing, "At the roll-call, I'll be there;" he had one foot on the counter, and was dancing with the other on the floor ; witness was acting at the time as the deputy marshal of the town of Sparta ; he requested McCook to desist, stating that he would break the glass ; saw that McCook was trying to raise a difficulty, in which he subsequently succeeded, and witness went round to shut the windows, in order to get everybody out of the house ; acting upon the information that McCook had cut a negro, he went back and asked him what he meant by cutting up men in that way ; told him to shut his knife and give it to witness, or to put it up ; he asked where Mr. Sunham, the marshal of the town of Sparta, was ; witness replied that it did not matter ; he then drew

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and opened his knife, saying that he did not shut his knife for any one, and started at witness; thought it was McCook's intention to cut him, so he struck him with his stick; he started again towards witness with his knife drawn back; witness struck him a second time with his stick, when he was shot from behind; supposed that the defendant fired this shot; saw the pistol when defendant fired the second time; the defendant fired a third shot at him, but it failed to take effect; when he was shot the second time he drew his pistol; did not see McCook lay his knife on the counter, nor hear him say he gave it up but not because he was afraid. Did not, when McCook laid his knife on the counter, turn to a crowd and say, "come in boys, here he is;" did not see him put his knife on the counter at any time.

Dr. E. O. Alfriend testified as to the dangerous character of the wounds, etc.

FOR THE DEFENDANT.

Joseph B. Knowles, sworn: Was present when the difficulty occurred between Achord and McCook; was standing at the corner of the counter next to the partition; McCook was at the right hand of the witness; Achord came into the room with a pistol in his hand, which he put to McCook's breast, and said, "give up." McCook replied, "I give up." Achord said, "lay that knife down." McCook laid it down, but said, "I did not do it because I was afraid." Achord then said, "come in boys," upon which several negroes, some of whom were armed with pistols, came in. As they entered the room, McCook picked up his knife. Achord then struck him over the head with his stick, and said, "here he is, boys;" struck him three or four licks. McCook did not advance upon Achord; he seemed to be warding off the blows; the stick used was a weapon which would have killed a man or a mule; a pistol was fired while Achord was striking with the stick; "the boys" were coming in before a blow was struck; three or four shots were fired in the room; Achord did not fire.

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McCook corroborated Knowles. He stated, in addition, that he was very drunk at the time of the difficulty.

Other evidence was introduced by the state, not material here. It mainly tended to show that McCook was too drunk at the time of the difficulty to have known anything about it.

The court, amongst other things, charged the jury as follows : "If, on the other hand, you find from the evidence that Achord was an officer of the law, I charge you that the case stands upon a different footing. If you believe from the evidence that Achord was acting in the capacity of a deputy marshal of the town of Sparta, the law presumes that he was rightfully in office as such. I further charge you, that as such officer, he had a right to interfere to prevent a breach of the peace between McCook and any other person, and if in the execution of his official authority he was obstructed or interfered with by the defendant, and in this interference the defendant did make the assault with the intent to kill the prosecutor, Achord, it would have been murder if Achord had died, unless you believe that the defendant had some provocation other than is set up in this case."

To this charge the defendant excepted.

The jury found the defendant guilty. He moved for a new trial upon the ground that the court erred in each of the aforesaid rulings to which exception was taken. The motion was overruled, and defendant excepted.

J. T. JORDAN, for plaintiff in error.

1st. Jackson cannot a second time be put on trial. 1st. His case was before submitted to the jury: *Newsom vs. State*, 2 Ga., 60. 2d. It could not then be withdrawn: *Reynolds vs. State*, 3 Ga., 53; 1 Wharton's Crim. Law, 588. Defendant in criminal case waives nothing unless it is expressed: *Hoy vs. State*, 39 Ga., 718.

2d. Jackson justified in defending McCook: Code, 4330; Roscoe on Crim. Ev., 765; 2 Wharton's Crim. Law, secs. 1019-20; Rust on Homicide, 32, 34.

3d. Jackson not culpable for resisting an officer, unless the

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evidence shows he knew Achord was an officer endeavoring to preserve the peace : 2 Wharton's Crim. Law, sec. 1290.

SAMUEL LUMPKIN, solicitor general, for the state.

1st. Special plea of once in jeopardy properly overruled. The case was not submitted to a legal jury ; case not submitted till full and legal jury is sworn : 1 Bishop on Criminal Law, (5th edition,) section 1014, (659.) This jury was not a legal one ; grand juror was on it. New trial granted in civil case for trespass, because two of the jury trying the case had been on the grand jury that found a bill against defendant for the same offense : Hawkes *vs.* Andrews, 39 Ga., 118. Member of grand jury accusing cannot be on jury trying : Rafe's case, 20 Ga., 65. Member of grand jury finding bill for misdemeanor not competent to try prisoner on it: Cobb, 45 Ga., 11. But suppose case was legally submitted. It could have been withdrawn by consent or from pressing necessity : 14 Ga., 426. Entry of "Juror withdrawn, mistrial declared," presumes consent : 14 Ga., 426. Trial progressing, prisoner silent, waives irregularities : Dean, 43 Ga., 220. Jury discharged with defendant's concurrence during the trial, he may be tried anew : 1 Bishop on Criminal Law, (5th edition,) secs. 673, 998. Jury may be discharged where verdict would be void or voidable, or anything in the order discharging, shows peril removed : 1 Bishop on Criminal Law, (5th edition,) secs. 668, 1036.

2d. To the main body of the charge there can be no exception. His charge that Jackson's interference with officer discharging his duty, and shooting him, would have been murder if Achord had died, is right: 2 Bishop on Criminal Law, (5th edition,) sections 655, 573. Duty of officer to arrest rioters, etc., and none may oppose him, and is murder to kill him thus engaged, especially if his official character is known: 2 Bishop on Criminal Law, (5th edition,) sections 653-4, 573, 574-5. Officers under peculiar protection of the law: Boyd, 17 Ga., 203-4.

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TRIPPE, Judge.

1. At a former term of the court a jury had been impaneled to try the case, but before any evidence was submitted, it was discovered that one of the panel had been one of the grand jury that found the bill. All the other jurors had been discharged for the term. The solicitor general moved for and obtained an order to withdraw the case from the jury, and to continue it. The defendant neither waived the objection to the juror nor objected to the order. He now pleads that action of the court in bar of any further trial. The juror who had been of the grand jury who returned the bill, was incompetent to try the defendant: *Rafe vs. The State*, 20 *Georgia*, 65; *Cobb vs. The State*, 45 *Ibid.*, 11. It is not, in all cases, that the impanneling the jury prevents the state from exercising the rights it has before a full jury is made. Section 4681, Code, provides that "if the fact (the incompetency of the juror) is unknown to either party, or the counsel, at the time the juror is under investigation, and it is subsequently discovered, such objection may be made and the proof heard at any time before the prosecuting counsel submits to the jury any of his evidence in the case." This means that if the juror is incompetent he may then be discharged. If he be discharged, there is not a full jury left, and why could not a *nolle prosequi* be then entered, or a continuance had, if there be ground for it? Here there was no other jurors from whom to complete the traverse jury. Besides, the defendant did not object to the continuance. Had he waived any objection to the juror, and the court then had withdrawn him, had withdrawn the case from the jury, a different question would have been presented. Under the principle contained in the Code, the court had the power to discharge an incompetent juror at the time it did this one, unless objection to him was waived; and the State was thereby remitted to all the rights it had up to and before the case was submitted to the jury, by impanneling the whole twelve.

2. It has been twice during the present term, besides this

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case, decided that to constitute the offense of an assault with intent to murder, it would be made to appear that the circumstances connected with the assault were such that had death ensued, the accused would have been guilty of murder: *Meeks vs. The State*; *Smith vs. The State*.

3. We do not propose to lay down any specific rule as to how far one person may go in defending another against the commission of a crime on him. By the common law, one who took life, even the life of an officer who was proceeding illegally against a third person, was not guilty of murder. Wharton, in his work on Criminal Law, 2 volume, section 1019, says, where a known felony is attempted on the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him, *or any other person present*, may interfere for preventing mischief, and if death ensue, the party so interfering will be justified. He cites Commonwealth *vs.* Daley, 4 Pennsylvania Law Journal, 153; 1 East, P. C., 271; Wharton on Homicide, 213. See, also, Roscoe Criminal Evidence, 751, 754. The case of the Commonwealth *vs.* Riley, Thacher C. C., 471, was where, in an affray, A knocked down B, and R, a bystander, believing the life of B to be in danger, gave B a knife to defend himself, and it was held that R was justified in giving B the knife. We would not lessen the protection the law furnishes officers in the discharge of their duty. But an officer is not one possessed of despotic power. He cannot be a tyrant, nor can he recklessly, in disregard of consequences, abuse his authority, and without necessity put at imminent hazard the life of any person. We do not say that this officer so acted in this case. We do not pass upon the testimony. The error in the charge of the court on this point was, that it did not permit the jury to pass upon it. It was, in substance, that if the officer, in the execution of his authority was obstructed or interfered with by the defendant, and in this interference the defendant did make the assault with intent to kill, it would have been murder had the officer died, unless the jury believed that defendant had some provocation other than was set up in this case.

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This was equivalent to ruling out the testimony of defendant's witnesses, Knowles and McCook, and saying to the jury that it did not affect the case. That should have been left to the jury with the proper directions. They were to pass upon the credibility of the witnesses, and if they believed them, to determine how far the rushing in of an armed crowd, and a violent attack with a deadly weapon upon McCook, would affect the question of malice on the part of defendant. Malice is an ingredient in the offense charged, as well as in that of murder, and it is for the jury, and not for the court, to find whether it exists in either case. We do not say the jury should have found that such violent demonstrations had been made. The testimony was conflicting on that matter. It was for the jury to pass upon it, and it was error for the court to tell them, in substance, that nothing had been proven by the defendant that could be of any benefit to him. We think that a new trial should be granted.

Judgment reversed.

THEODORE EWING, administrator, *et al.*, plaintiffs in error, vs.
R. J. MOSES, administrator, defendant in error.

1. Whether answers to interrogatories which are claimed to be leading, shall be read, is a question resting in the sound discretion of the judge trying the cause, and this court will not overrule his judgment unless it be manifest that injustice has been done.
2. Where the main issue in a cause on trial was whether the defendant had procured a receipt in full from an heir-at-law by false representations, and it was in proof that he had written a certain letter to B, another of the heirs, and had in that letter directed B to communicate with the plaintiff, and that he had written letters to other heirs, referring to this letter to B, and the plaintiff, in her interrogatories, stated that in giving the receipt she acted on said letters, with a like one to herself, and attached to her answers the original letter to B:
Held, that it was not error in the judge to permit the answers and the original letter to B to go to the jury in evidence.
3. When under the charge of the judge the jury might count compound interest against a defendant according to law, yet, if the verdict is right counting only simple interest, it should not be disturbed.

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4. When substantial justice is done by a verdict this court will not grant a new trial for errors in the charge of the court, which, though not strictly correct, could not, under the facts of the case and the result, have injured the defendant's case before the jury.

Interrogatories. Evidence. Interest. New trial. Before Judge BARTLETT. Muscogee Superior Court. May Term, 1873.

Jean Smith Dawson filed her bill complaining of Theodore Ewing, administrator of William Matheson, James Rankin in his own right and as executor of William Rankin, Alexander Matheson and Elizabeth Ewing, formerly Matheson. She claimed to be one of the heirs of George Smith, a citizen of Georgia, who died intestate about 1841, leaving a large estate in Georgia, and that she was entitled to one-fifth and one-tenth of the estate. She alleged, in substance, as follows:

Kenneth McKenzie became administrator of George Smith and partly administered the estate. McKenzie died in 1854, leaving L. T. Downing, his executor. On the 2d of April, 1855, William Matheson, a nephew of George Smith, and who knew complainant was entitled to a distributive share, was appointed administrator *de bonis non* of George Smith, and gave bond with William and James Rankin as his securities, and who borrowed from him of the assets of the estate \$15,000 00.

William Matheson, as such administrator, received from Downing, as the balance of the estate of George Smith, \$28,- 155 00, and during his life, which lasted one year, he wasted said estate, except \$11,839 25, which was represented by the note of William Rankin, and another note of Woodruff & Goetchius of \$553 05, and which was received by Elizabeth Matheson, now Ewing, administratrix, she having been so appointed on the 12th of April, 1856, giving as her securities James and William Rankin, and Alexander Matheson. William Rankin has since died and James Rankin has qualified as his executor. Elizabeth Matheson returned to the ordinary a receipt, being a schedule of effects of George Smith,

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found at the time William Matheson died, describing the above two notes. Immediately upon obtaining letters, and well knowing all the foregoing facts, and knowing that complainant was a widow, poor and aged, and living in Scotland, and wholly ignorant of the condition of said estate and her rights as distributee, the said Elizabeth Matheson, William and James Rankin, combined together for the purpose of defrauding complainant of her just rights and obtaining from her for \$1,250—a discharge of all claims as the sister of George Smith. In pursuance of this intention, they caused Alexander Matheson, in whom complainant would confide implicitly, to write to her the following letter:

“COLUMBUS, GA., 14th April, 1856.

“MR. GEORGE ANDERSON :

“*Dear Cousin*—At the death of Kenneth McKenzie, my brother William was appointed by the court of ordinary administrator on the estate of George Smith, which office he held when he (William) died, and since his death his wife holds all the papers connected with the estate of George Smith.

“When my brother was alive, he contended that he was the only just heir to all the money here, and though he is dead, yet his claim is the same in the person of his wife and children, and they now claim it.

“By the law of this country, any person dying leaving real estate, and if said person has no heirs in the country, it goes to the *state* in which the real estate may be in at the time of the person’s death. But if any heir should be in the country before his death, and that heir should become a citizen of the *United States*, he becomes rightful and only heir to all real estate, or proceeds therefrom, in preference to all other heirs, (though they may be nearer by blood,) or even in preference to the state. On the above grounds my brother, when alive, (and his wife now) contended that he was rightful heir to all money here, and it can be very clearly proved that the money

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now here is the proceeds from real estate owned by George Smith at his death.

" You know that William was in the United States before our uncle's death, and that he became a citizen of the United States ; you also know that he was the only one of all the heirs or relations of George Smith in this country at the time of George Smith's death, so by law, whenever William became a citizen he also became heir to all the real estate of George Smith or the proceeds therefrom.

" It is true that I am now in this country, and the only one in this country related to George Smith by blood, but my brother was before me, and was a citizen before I came, therefore I cannot claim anything ; you cannot who are aliens.

" Since my brother's death, his wife has made a proposition to me as follows : She will give \$5,000 00 upon condition that all the other claimants give up their claims to her ; said \$5,000 00 to be divided amongst said claimants, who are you, your brothers and sisters, aunt Jean, aunt Hutchin's children, and Jesse Duncan and myself; or to make the thing more plain, put them in families—say, Ann Anderson, Jean Dawson, Elizabeth Hutchins, Christian Matheson or childer, or children, or children, (our uncle William dying without children or wife, therefore his claim amounts to nothing.) That would be \$1,250 00 to be divided amongst each family. After receiving the above proposition I concluded to write you, and I would ask it as a personal favor of you, that you would let all the rest know of it. As for Jesse and Duncan, I will write them. I would most earnestly press upon you all to accept the proposition now made. I am here on the spot ; I know all the circumstances of the case, and how the law is. I have stated the case truly.. I am uninterested in any way, except in the proposition new made. Indeed, I may say it is mainly by my efforts such a proposition is now made. There is not more than \$15,000 00 in all here, and that is in notes, etc., besides there is outstanding debts against the estate of considerable amount which is not settled, so that you see the amount specified is not such a bad one; it is more

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than I expected when I first started the question, but no more will be given. Suppose you should go to law about it, would you receive more? No, not so much, even should you gain it, which you would not. What lawyer here of any account would undertake such a case?—certainly none would do it without their fee in their hands, you being in a foreign country. All the lawyers I have spoken to have persuaded me as friends not to go to law, for I could recover nothing, and I would have all the expenses to pay, which would not be little, for lawyers do not work for nothing in this section of the Union, and the court expenses are heavy.

“I leave the case now with you all. Decide as you please; do nothing hastily; consider on the matter—I have done so for years—you have my conclusion, which is: I am no heir by law, and can receive nothing except my share of the proposition now made to you. If you think fit to accept it, it will be well; but if you do not, I am authorized to say by William’s wife that no more will be given; that this is the first and the last proposition that will be made, and if you do not accept, you may go to law as soon as you please; she is and will be prepared for you, and I may add she has the means and the friends to law about it as long as you please. You should accept, and be glad that none is claimed that you have already got. If you go to law and collect, it is the law of Georgia decides the matter.

“If you should wish me to act for you or assist you in the matter, I will do so with pleasure. I have all along acted in this matter, even in my brother’s lifetime, as your friend, and I am willing to do so now.

* * * * *

“Yours, respectfully,

“ALEX. S. MATHESON.”

Believing she could place full faith and credit in the assurances of her nephew, Alexander, and knowing that his opportunity of ascertaining the law and the facts were ample, she accepted the terms proposed by him, and on receiving the

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sum of \$1,250 00 from him, did, in 1856, make a receipt of her claim and send it to Alexander Matheson, which money, in pursuance of such fraudulent intent, was advanced by William Rankin, out of the funds of George Smith, then in his hands. She rested under the conviction that the facts were all true, and the law bearing thereon was as stated in said letter, until very recently. And she charges that she has been deceived, and her receipt obtained by fraud in this, that by the law of Georgia, William Matheson was not the heir; that he did not arrive in Georgia until after the death of George Smith, he, the said Alexander, having stated as a fact that said William was a resident of Georgia before the death of George Smith. That by the laws of Georgia the property of said George Smith went to his next of kin, and that at the time complainant gave the receipt, she was entitled to \$12,000 00, all of which was well known to defendants, and said facts were fraudulently concealed from complainant with the intent and for the purpose of obtaining a settlement at the nominal sum of \$1,250 00.

Complainant prays for an account.

The defendants answered substantially as follows: Defendants say that William Matheson did in his lifetime set up a claim to the whole of George Smith's estate, on the ground that the said George was an alien, and the said William was the only relative who was in the United State at the time of his death, and that by the laws of Georgia the real estate descended to him. Complainant knew when William started for Georgia, and when the said George died, she being a grown woman, and the said Alexander only a small boy, and none of defendants deceived or attempted to deceive complainant as to the facts of the case.

Complainant better knew the facts than Alexander, who was then, and for a long time after the death of Smith, in Scotland. They admit the writing of the letter by Alexander, but deny that it was written or sent to complainant; they deny that it was written to deceive or mislead, but only to make known the grounds of the claim of William and the

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proposition for a compromise. They deny that complainant was misled or deceived by the letter. They deny that complainant acted on the statements in said letter as to the law, but say she was informed by others that the law was different; that the said Alexander, in good faith, stated the law as he was informed and believed it to be. That complainant did not sign the receipt under any mistake as to her being an heir of George Smith or not entitled to a part of his estate, under the law of Georgia, and say that she was fully informed, and had been recognized as an heir, and had received large sums from McKenzie as such heir; that she was fully advised as to her rights in the premises. They deny any misrepresentations as to the amount of the estate which came to the hands of said Elizabeth. They admit the writing of the letter by William Matheson, and say its contents were known to complainant before signing the receipt. They say the settlement was made and the receipt given after full information as to her rights, and after full consideration; that it was made because of the controversy which had arisen between William Matheson and the next of kin of George Smith, as to who was entitled to the estate of George Smith, and as a compromise of the claim of complainant as an heir, and they claim the settlement to be a bar to complainant.

James Rankin, as executor of William Rankin, deceased, filed a sworn plea, containing the following admissions:

That before and at the time that William Matheson became administrator, he claimed to be entitled to all the proceeds of the real estate of George Smith; that William and James Rankin owed to Lemuel T. Downing, as executor of Kenneth McKenzie, \$14,843 00, by a promissory note, and in order to pay said note it was agreed by all parties that the said William Rankin should give his note for a like sum, payable to William Matheson *individually*, and that the said Matheson should receive the same as cash from Lemuel T. Downing, executor; that this was done; that he paid Matheson, on account, this note, \$5,300 00, which Matheson, to the extent of \$3,300 00, invested in negroes, as he considered himself enti-

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ted to it; that he refused to pay Theodore Ewing, administrator, anything on said note, except certain amounts which went to the payment of the heirs.

The complainant died pending the litigation, and R. J. Moses, her administrator, was made a party in her place.

The depositions of Jean Smith Dawson were tendered in evidence. The fourth and fifth interrogatories were objected to as leading. They were as follows:

"4th. If Jean Dawson ever gave to Theodore Ewing, or any one else, a receipt in full for her portion of the estate of George Smith, deceased, state to whom said receipt was given, the consideration received for giving said receipt, and the representations made to Jean Dawson by which she was induced to give such receipt. If you have any letters from Theodore Ewing or James Rankin, or from Alexander Matheson, which induced the giving of said receipt, attach the originals to your answers."

"5th. If you state any misrepresentations were made to Jean Dawson, by which she was induced to give said receipt, after stating what they were and who they were made by, state whether, but for those representations, you would have given the receipt?"

ANSWERS.

To the fourth interrogatory she answers: "I sent through Mr. James Lawson, banker, Huntley, a receipt, I think, in full for my portion of the estate of the deceased, George Smith. Alexander Matheson, Columbus, was the person who made the offer, in writing, from America, which was \$1,250 00, or two hundred and fifty pounds sterling, and he sent on the receipt through Mr. Lawson, banker, Huntley, for my signature. I do not remember in whose favor the receipt was taken. The money was sent over to this country after the receipt was sent back to America, signed. A copy of the offer, namely, that sent to George Anderson, (similar to that made to me and others) is sent herewith. The representations which were in that offer, as also similar representations in letters

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written by the said Alexander Matheson to Jesse Matheson, Huntley, his sister, Barbara Johnston, his cousin, to myself, and the said James Lawson, induced me to accept the offer. Matheson is my nephew, and I had great confidence in him. I lent him a large sum of money (£100) on his leaving this country for America, and I had not any reason to distrust him.

To the fifth interrogatory she answers: "That but for the above representations I would not have granted the receipt. I first discovered such statements were misrepresentations when William Lawson went out from this country to America about the beginning of the year 1867."

The complainant relied upon several letters written by the defendant, Alexander Matheson, the one to George Anderson, set forth in the bill, one to his sister, and one to his cousin. They were objected to on the ground that they were not addressed to Jean Smith Dawson, and there was no evidence that she had seen them before giving the receipt.

These letters were to the other heirs of George Smith's estate, in which he referred to the letter of George Anderson as containing the offers of compromise proposed by his sister-in-law, the administratrix, and urging their prompt acceptance. To the depositions of Jean Smith Dawson was attached the letter to George Anderson.

The objections were overruled and the defendants excepted.

The court, in its charge, authorized the jury to compound the interest on the amount found to be due to complainant, as provided in section 2603 of the Code. To which the defendants excepted.

The jury found for the complainant \$13,315 25. Error is assigned upon each of the aforesaid grounds of exceptions.

PEABODY & BRANNON, for plaintiffs in error.

R. J. MOSES; M. H. BLANDFORD, for defendant.

McCAY, Judge.

1. We are not clear that the questions objected to are leading. But we *are* clear that there was no abuse of the discretion of the court in permitting the answers to be read. Unless a very great change is made in the mode of executing interrogatories, the rule against leading questions must be very liberally interpreted in such cases. The party must ask all his questions at once. He must base one upon the answer he expects to another, and the witness who always has an opportunity of reading over the whole, can, if he desires, easily get the drift of the questions. Why be so precise as to the form when this broad road is open in all cases? This is one of the evils of the system and can only be met by weighing all testimony thus taken with caution.

2. Taking all the witness says together, and especially considering the contents of the letter to George Anderson, and the letters to the other parties including that to Matheson's sister, we think it pretty plain that the letter to George Anderson was sent as a sort of circular to all, and that the copy—as the witness calls it—was a duplicate of the original sent to her. As by the terms of the letter sent, George was to communicate with her, we think the evidence of this being a duplicate is sufficiently plain to justify and excuse any further explanation as to the letter to the witness. That this is the letter sent to her is not perfectly clear, but sufficiently so, we think, to permit the answers to be read.

3. We do not think a verdict allowing compound interest as prescribed for settlements with trustees in section 2603 of the Revised Code, would be proper, and the charge of the court is objectionable on this point, first, because this section of the Code was suspended during the war; and, secondly, because we think the section applies to suits against trustees proper, and not to suits against administrators of trustees, for failures after the death of the trustee. The act contemplates that the trustee is acting, using the funds, and failing to report the interest he is making, by yearly returns, and

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compound interest is put upon him as a penalty for this failure, and on the presumption that he collects the interest annually and reinvests it. But in calculating the amount received, and comparing that with the verdict, we find the plaintiff entitled to the verdict, even though only simple interest be charged. The charge, therefore, did no harm if the verdict is right on the main ground.

4. The principal issue on trial was whether the receipt was procured by fraud. Even if, as defendant contends, it was taken as the result of a compromise, yet, if the fact upon which the doubtful point of the law arose was a plain, palpable falsehood, known to the party stating it, even a compromise thus settling the dispute would be a fraud. As the facts appear, here was a nephew in whom the aunt confided, in a far country, writing home to his venerable relative whom he knew trusted him implicitly, stating a lie, what he knew to be a lie, and on this, getting up a doubtful question of law, which the old lady, taking the fact for true, compromised. Was not this a fraud? We think so. Taking all these letters together, and adding the lame explanation given by the writer on the stand, and we think the verdict clearly right. The law as to the compromise of doubtful rights, is only by the very largest charity applicable to the case, and we think the judge right in giving very little prominence to it. There is some language in the charge that is not strictly correct. He should have said "and" instead of "or," in connecting the sentence as to the difference between the amount due and the amount of the receipt and the reliance of the plaintiff on the false representations. But the verdict is so much in accord with the evidence and the principles of justice that we will not disturb it for this error of the court, which is, perhaps, only at last a clerical error.

Judgment affirmed.

Gormerly vs. Chapman.

PATRICK GORMERLY, plaintiff in error, vs. WILLIAM D. CHAPMAN, defendant in error.

1. If the claimant has an equitable right to compel the plaintiff in execution to levy upon property still owned by the defendant, before levying upon land conveyed to him, he must allege it in his pleadings, to entitle him to such relief.
2. Where land is fraudulently conveyed by the defendant in execution to the claimant, for the purpose of defeating his creditors, such creditors may levy upon such property, in the first instance, and this right is not defeated by the fact that the defendant subsequently employed counsel to subject said land to the payment of his debts.

Claim. Equity. Execution. Levy and sale. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

For the facts of this case, see the decision.

HENRY L. BENNING; M. H. BLANDFORD, for plaintiff in error.

E. H. WORRILL, for defendant.

WARNER, Chief Justice.

In August, 1866, Hall made a deed to the plantation on which he then lived to Gormerly. On the 30th July, 1870, the land was levied on as the property of Hall, to satisfy an execution in favor of Chapman against Hall, and was claimed by Gormerly. It does not appear who pointed out the property to be levied on. There is much evidence in the record going to show that the land was conveyed by Hall to Gormerly for the purpose of protecting it from Hall's creditors, and that Gormerly afterwards claimed the land for himself. The record exhibits a clear case of an intention on the part of both Hall and Gormerly to defraud the creditors of Hall. At the time the levy was made on the land claimed by Gormerly Hall had other lands in Talbot county. It was also proved on the trial of the claim case, by Hall, the defendant in exe-

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cution, that he had employed Worrill & Forbes to represent his creditors, and had agreed to give them \$500 00 to find the land levied on subject to his debts, because he wanted his just debts paid. The court charged the jury, "that if they believed from the evidence that Hall made the conveyance of the land in controversy to Gormerly with intent to delay or to defraud his creditors, and such intention was known to Gormerly at the time, then said deed of conveyance is void as to creditors, and the property therein conveyed is subject to the payment of plaintiff's *fi. fa.*, although Hall had other property at the time sufficient to pay the debt, and it made no difference if Hall did employ counsel in this case and agreed to pay them \$500 00 to find the property subject." To this charge of the court the claimant excepted. The jury returned a verdict finding the land subject to the execution.

1. It was insisted on the argument that the plaintiff's execution should have been first levied on the other land of Hall before levying it on the property conveyed by him to Gormerly. If Gormerly, the claimant, would have had any equitable right to have compelled the plaintiff to have levied his execution on Hall's other land first, before levying it upon the land conveyed to him, he should have alleged it in his pleadings, under our practice, to have entitled him to that relief, which was not done in this case.

2. The jury, however, have found by their verdict, that the conveyance from Hall to the claimant was made with intent to delay and defraud his creditors, and that such intention was known to the claimant at the time, and there is an abundance of evidence in the record to sustain their verdict. The conveyance of the land to Gormerly being void as to Hall's creditors, they had the right to levy on it in satisfaction of their debts, notwithstanding Hall may have had other land. In view of the facts of this case, it made no difference if Hall did employ counsel and agree to pay them \$500 00 to find the land subject. The effect of Hall's employing counsel to subject the land injured no one but Gormerly, his confederate in the fraud, and it does not lie in his mouth to

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complain of it. The evidence does not show that there was any collusion between Hall and Chapman, his judgment creditor, to subject the property to his execution. Whilst the courts should be careful to see to it that neither of the parties to the fraudulent conveyance should enjoy any benefit from their own fraudulent conduct, so far as the rights of honest people are concerned, yet, so far as their own acts are concerned, in connection with the fraudulent transaction affecting no one's interest but their own, the courts will let them alone *severely*. We find no error in the charge of the court to the jury in view of the evidence contained in the record.

Let the judgment of the court below be affirmed.

**LEWIS WIMBERLY, plaintiff in error, vs. EDWARD A. ADAMS,
defendant in error.**

Where a judgment was obtained against a principal and security on a promissory note, and an appeal was entered by the defendants, the security filing a plea of *non est factum*, and pending the appeal it was agreed by the plaintiff that if the security would withdraw his appeal and permit the judgment below to stand, he, the plaintiff, would look to the principal alone for the payment of the judgment:

Held, that on the withdrawal of the appeal, the security was relieved, and that he might set up this relief by an affidavit that the execution issued on the original judgment, was proceeding illegally, and setting forth the facts of the agreement and his action thereon.

Principal and security. Illegality. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

On March 29th, 1867, an execution issued from Talbot superior court, in favor of Edward A. Adams, against Simon T. Veile, as principal, and Lewis Wimberly, as security, for \$1,028 92 principal—\$789 00 interest and costs, which was levied upon certain lands as the property of Wimberly. The latter filed an affidavit of illegality, to the effect that at the March term, 1867, of said court, the case in which the judg-

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ment was obtained, upon which said execution was based, was pending upon the appeal; that he had filed the plea of *non est factum*; that the plaintiff agreed with him that if he would dismiss his appeal he would release him from all further liability on the note sued on; that with this understanding he dismissed the appeal; that the plaintiff, in violation of this agreement, has had the aforesaid execution issued and levied upon his property.

The case was submitted to a jury upon the issue thus formed. The evidence sustained the facts set forth in the affidavit of illegality.

When the testimony was closed the court announced that he would try the case himself, and thereupon dismissed the affidavit of illegality. To which ruling the defendant excepted.

M. H. BLANDFORD; E. H. WORRILL, for plaintiff in error.

WILLIS & WILLIS, for defendant.

McCAY, Judge.

It was insisted at the hearing of this case that the agreement set up in the affidavit was without consideration, that the plaintiff got nothing for the release, and that it is, therefore, void. But we think otherwise. In the first place, it is not necessary that the plaintiff should have got a benefit. The defendant, by agreeing to withdraw his plea, lost his defense of *non est factum*, and withdrew the appeal, and under the law this loss to him was a valuable consideration. Besides, the plaintiff got clear of the appeal. He got the right to go on immediately against the principal, and to go on, too, with a judgment ranking in dispute with other judgments, as a judgment dated at the time of the judgment appealed from. So that there was not only loss to the security but advantage to the plaintiff, and the security having acted upon the agreement by having the appeal withdrawn, it would be permit-

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ting the plaintiff to entrap him, to allow him to repudiate his agreement. The real difficulty about the case, however, is that the argument is a specious one which claims that the facts show an effort to set up a cotemporaneous parol agreement, that a judgment then taken shall not be enforced—an effort to go behind the judgment and attack it by an affidavit of illegality. But this is rather specious than sound. The appeal was an effort to alter the original judgment—the attack made is not on the judgment taken in pursuance of the agreement but on the original judgment. And the attack is by setting up facts which occurred after it was taken. The appeal vacated it only for certain purposes. So far as concerned the investigation on the appeal, the original judgment was vacated, but it still remained as a lien on the defendant's property, and with the capacity of operating in full force if the plaintiff should dismiss the appeal for informality or for want of security, or if the defendants should, by their own motion, withdraw it. And in this case the agreement to withdraw the appeal was an agreement that the original judgment should stand. This whole agreement was by parol, and when executed by the defendants, the original judgment, thus relieved of the appeal, stood of full force, except as the agreement provided, from its date. It became a judgment as of the date at which it was entered up. So that at last the agreement is subsequent to it. To permit the plaintiff, if the facts are as defendant contends, to repudiate his agreement would be to aid him in the commission of a fraud. And courts, in an attack against fraud, do not hesitate to break through even those rules which hedge round the sanctity of judgments and specialties against parol evidence. We think the court should have allowed the case to go to the jury on the facts, and if the jury should agree with the defendant's plea as to the facts, we think that he is discharged.

Judgment reversed.

Werner vs. The State of Georgia.

HERMAN WERNER, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

An indictment charging that the defendant did, on the fourth day of April, 1873, being Sunday, keep open a tippling house, when in fact the said fourth day of April was Friday, is not a good indictment, and a motion in arrest of judgment should have been sustained.

Criminal law. Indictment. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

Werner was placed on trial upon an indictment charging him with the offense of misdemeanor, the only material portion of which was as follows: "For that the said Herman Werner, in the county aforesaid, on the fourth day of April, in the year of our Lord, eighteen hundred and seventy-three, being the Sabbath day, did keep open a tippling house." The defendant pleaded not guilty. The jury found to the contrary. He moved that judgment be arrested because the indictment showed upon its face that the day on which the tippling house was kept open, was not the Sabbath, as the court must take judicial notice of the fact that April 4th, 1873, was a week-day. The motion was overruled and defendant excepted.

L. E. BLECKLEY, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

TRIPPE, Judge.

The indictment charged the defendant with keeping open a tippling house "on the fourth day of April, 1873, being the Sabbath day." The fourth day of April, 1873, was Friday. Was it a good indictment? We are fully aware of the general rule, that though a day and year must be alleged in every indictment, time is not material, and that a different day from the one laid may generally be proved, provided it be within the period prescribed by the statute of limitations. But there

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are several exceptions which prevent the rule from being of universal application. One is where written instruments are pleaded. If their dates be stated they must correspond with the dates of those produced in evidence. If any date is given in the pleading which is to be proved by matter of record, it must be proved as stated: 11 East, 508; 4 T. R., 590. So when time is of the essence of the offense, it must be correctly alleged and proved. In this case, keeping open a tippling house is not an offense prohibited by law. It becomes penal only by its being done on the Sabbath day. It is the time *when—the character of the day on which the act is done*—that constitutes the offense. It was no violation of law to keep open the house, nor to keep it open on Friday, nor on the fourth day of April, 1873, or the fourth day of any other month, that did not fall on Sunday.

As courts will judicially recognize the coincidence of the days of the month with those of the week, (1 Greenleaf's Evidence, section 5,) this indictment was equivalent to charging the defendant with keeping open a tippling house on Friday, the 4th day of April, 1873, being the Sabbath day. Could an indictment be sustained with such a flat contradiction on its face? It alleges the act to have been done on one day, which would have made it an innocent act. Could that act be converted into a criminal one by stating that the day already given was a day which it was not and could not be? Take the case where the doing certain things within a certain period of time is prohibited—such as killing or hunting certain animals or game in specified localities between the first of March and the first of September—if a defendant were indicted for having violated such a statute on the first day of October, would not the indictment be bad, although it had the further allegation that the day stated was within the prohibited time? There must be some certainty in pleadings, both civil and criminal. In the case of the United States *vs.* Brown, 3 McLean, 233, it was held that the rules of pleading are the same in civil and criminal cases. This is generally true, and many of the elementary writings give the same

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general rules as governing the pleadings in both classes of cases : 3 Starkie on Evidence, 1539, 1542 ; 1 Chitty's Pleadings, 263 ; 1 Chitty's Criminal Law, 294, 295. Now, if a declaration alleged that the defendant was indebted to plaintiff a certain sum, and on a certain day *had paid* it, or on a certain day *had paid* a claim which was now *due and unpaid*, would not the pleadings or petition be void for uncertainty, and demurrable? And if an indictment show in one part that the defendant has violated no law, can it hold him as guilty because it so charges him in another part, by stating facts in utter conflict with the preceding allegation ? Pleadings which are so contradictory, or which contain such conflicting statements that they show nothing, are a legal nullity, or at least no legal judgment can be rendered on them. The holding we make is not in conflict with what was said in *Connor vs. The State*, 25 Georgia, 515, that an indictment is good although an impossible day be stated as that on which the offense was committed. In that case, time was not of the essence of the offense. The act charged was a crime, no matter what the day or year was on which it was committed, provided it was within the statute of limitations. What has been said shows that this decision is put on altogether different grounds than those set up in the remarks of Judge LUMPKIN in *Connor vs. The State*. Judge BENNING, in his concurring opinion in that case, (Judge McDONALD dissented from the judgment rendered,) recognized that there were cases where time was a matter affecting the real merits of the case. The same was done in *Dacey vs. The State*, 17 Georgia, 439. Where that is so, as it is here, an indictment cannot be sustained, which, charging an act to have been done on Friday, thereby showing it an innocent act, seeks to convert it into a criminal one by calling Friday the Sabbath day. Mere technicalities may generally be disregarded, but distinct, clear and irreconcilable contradictions vitiate pleadings both criminal and civil.

Judgment reversed.

Meeks vs. The State of Georgia.

**JOHN MEEKS, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.**

1. Where on the trial of an indictment for assault with intent to murder, there was evidence that whilst the prisoner and another were engaged in a fight, two other persons interfered against the prisoner, one striking at him with his knife, and the other hitting him with his fists, and the fight having ceased by mutual consent, the prisoner immediately cut his principal opponent with his knife, it was error in the court to refuse the following written request to charge the jury: "If the circumstances surrounding the prisoner at the time of the stabbing were such as to excite the fears of a reasonable man that he was in danger of losing his life, or that some great bodily harm would be done to him, he is not guilty," especially as it does not appear in the record that the court did charge that if there was great provocation (so as, that if death had ensued the crime would have been manslaughter only,) then they could not find him guilty of assault with intent to murder.
2. It was not error to admit testimony of the sayings of the prisoner next day after the fight, showing bitter hatred towards the person stabbed, as it tended to show malice at the time of the stabbing.
3. It is not error in the court, on the trial of a criminal case, to require the witnesses of both the state and the prisoner to be sworn, and to leave the court-room before commencing the examination of any of the witnesses.

Assault with intent to murder. Evidence. Witness. Before Judge CLARK. Macon Superior Court. December Term, 1873.

Meeks was placed on trial for the offense of an assault with intent to commit murder, alleged to have been committed upon the person of Taylor Killebrew, on October 23d, 1873. The defendant pleaded not guilty.

The case presented by the testimony was substantially as follows: The defendant, with Taylor Killebrew, John Killebrew and Ansley Watson, were summoned by one Hobbs, a constable, as a posse to execute a warrant. When near the house of Henry Hobbs a difficulty arose between the defendant and Taylor Killebrew. The fight that ensued, according to all the evidence, was mutual. The witnesses for the state swear that they did not see any one participate in the fight

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except the two parties above stated. The witnesses for the defense show that the defendant was assaulted by Taylor Killebrew, James Killebrew and Ansley Watson ; that both the Killebrews had knives.

The witnesses for the prosecution further show, that during the progress of the fight defendant made a proposition to quit, to which Taylor Killebrew replied that he was willing if defendant was ; that he then shoved defendant off and retired from five to seven steps to a fence, to which point the defendant followed and stabbed him in the breast, inflicting a wound endangering his life; that at the time of the stabbing no one was interfering with the defendant ; that about one-half a minute had elapsed after the fight had ceased before the wound was inflicted.

The witnesses for the defense swear that James Killebrew was endeavoring to cut the defendant from the rear, while Taylor Killebrew was engaging him in front ; that this was the condition of the combatants at the time the proposition to cease fighting was made, and that as soon thereafter as a man could turn around once or twice, or walk two or three steps, the defendant stabbed Taylor Killebrew, who was standing about three steps off, at the fence; that James Killebrew was prevented from cutting the defendant by Henry Hobbs, and that he asserted that he would cut him if he could get at him.

The jury found a verdict of guilty. The defendant moved for a new trial upon the following grounds, *to-wit*:

1st. Because the court erred in requiring the witnesses for the defendant to be sworn at the same time with the witnesses for the prosecution, and to be at once sent out of the court-room, before the defendant had opened his case.

2d. Because the court erred in permitting D. A. Ray, a witness for the state, to testify that on the preliminary examination, the day after the difficulty, the defendant said that he wished Killebrew was dead and in hell, if he (defendant) had to be hung the next minute.

3d. Because the court erred in refusing to charge the jury

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as follows: "If the circumstances surrounding the defendant, at the time he did the stabbing in this case, (if he did stab Killebrew) were of such a character as to excite the fears of a reasonable man that he was in danger of losing his life, or that some great bodily harm would be done him, he is not guilty, and the jury will so find."

The charge of the court, after reading the sections of the Code on murder, manslaughter, and voluntary manslaughter, proceeded as follows: "In order to determine the intention of the defendant, you will look closely into the testimony. If the defendant proposed, in the midst of the fight, to quit, and Killebrew agreed to it, or if Killebrew proposed to quit and defendant consented, it is for you to inquire into defendant's motives in either case. Was the proposition, if made, or if accepted, made or accepted in good faith, or was it made or accepted by the defendant for the purpose of obtaining an undue advantage over Killebrew? If for the purpose of getting an undue advantage, and if after the fight had ceased, defendant followed up Killebrew and gave him a dangerous wound with a knife, he is guilty of an assault with intent to murder. If defendant made or accepted a proposition to quit fighting, in good faith, if he still followed up Killebrew and inflicted a dangerous wound with a knife, if, at the time, he was under the influence of that violent impulse of passion supposed to be irresistible, then he is not guilty."

The motion was overruled, and defendant excepted.

W. S. WALLACE; W. A. HAWKINS, for plaintiff in error.

C. F. CRISP, solicitor general, by B. B. HINTON, for the state.

McCAY, Judge.

1. It is not our province to say whether this defendant be guilty of the offense for which he has been convicted, but under the circumstances we think he was entitled to the charge asked. The crime of assault with intent to murder

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has, as one of its essential ingredients, that state of mind which the law calls malice, to-wit: the deliberate intent to kill in a bad spirit. If the slayer be provoked by an assault, if he have his passions aroused by a blow, the law excuses his heat, and though he may not be justified in the killing, the law deals with it as manslaughter and not murder. If the blows in this case were given under such circumstances, as if death had ensued it would have been manslaughter only, this was not an assault with intent to murder. We do not express any opinion as to what the jury ought to have found, nor do we say that this or that witness was entitled to credit. But under the testimony of one or two of the witnesses we think the jury might fairly have thought, if they gave full credit to these witnesses, that the prisoner when he did this act was in fear of his life. When we look at the facts as they are told now, we can draw far more accurate conclusions than it is possible for one to do with his blood up in the midst of a conflict or just as it ceases, and we think the court should have charged as requested. The prisoner was entitled to have charged, on request, any principle of law material and pertinent to the case, in any view that, under any of the evidence, may be taken of it. The burden of proof may be one way, yet if there be any evidence on a particular line before the jury, he has a right to have the law in that aspect of his case, if he asks it, charged by the judge to the jury.

2. We think there was no error in admitting the statements of the prisoner next day. They indicate strong malice against his opponent at that time, and furnish a fair ground for an inference of malice at the time of the rencounter. Statements, both before and after, are indications showing the condition of the mind at the time of the act, and are circumstances having more or less weight according to the time of their utterance and the circumstances of the case. We think these statements were not too long after. The time that had elapsed weakens their force, but we think them competent to be introduced, leaving their weight to the jury.

3. We have discussed this point in Wair's case at this term.

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We think the provisions of the Code cumulative only, and that the old rule is still of force when the demand is made, or at the option of the judge without a demand. It can do no harm to the cause of truth, and the inconvenience of it may well be borne for the facilities it affords to prevent fraud and tampering with witnesses.

Judgment reversed.

JANE E. SIMMS *et al.*, plaintiffs in error, vs. WILLIAM R. PHILLIPS *et al.*, defendants in error.

1. Where an execution against the mother is levied upon property generally, in which the children have an interest, and neither the interest of the mother nor of the children, is clear and ascertained, the sale will be enjoined.
2. A levy upon property in which others besides the defendant are interested, must specify the interest levied on.

Trusts. Execution. Levy and sale. Before Judge HOPKINS. Fulton county. At Chambers, January 6th, 1874.

Jane E. Simms, the wife of Thomas G. Simms, and her minor children, Jane E. Simms, Emily C. Simms and Sallie T. Simms, by their next friend and uncle, Joel D. Simms, filed their bill for relief, account and injunction against Thomas G. Simms, William R. Phillips, Phillips & Flanders, and A. M. Perkerson, sheriff of said county, making, in brief, the following case:

Various sums of money and pieces of property were conveyed to Joel D. Simms in trust for Jane E. Simms and her children, by the mother and father-in-law of said Jane E. Subsequently, Thomas G. Simms succeeded Joel D. Simms, as trustee, and assumed possession of the estate. The property and money was thus placed in trust in order to protect it from the debts and liabilities of Thomas G. Simms, who was in an embarrassed condition. The trustee invested said funds in houses and lots in the city of Atlanta, sold the property and

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repurchased other, speculated with the funds as his own, making large profits, until at length a portion thereof became invested in a lot in the city of Atlanta, on the corner of Forsyth and Grubb streets, and in a tract of land containing one hundred and twenty-four acres, being a part of the north half of land lot one hundred and sixty-two, and the north half of land lot one hundred and fifty-nine, in the fourteenth district of originally Henry now Fulton county, and the improvements thereon. The deeds to this property, either by mistake or from want of legal skill, were not written as intended, nor as the facts and the consideration required, but the title was conveyed for the separate use of Jane E. Simms, when her children should have been embraced therein at least upon equal terms with herself. In addition to this, complainants charge that a portion of the aforesaid trust funds and property, which went into the hands of said Thomas G. Simms, was derived from the sale of certain lands in Coweta county, which were conveyed to the aforesaid minor children exclusively, by the will of their grand-father. They say that the proceeds of these lands, and the rents thereof, purchased the one hundred and twenty-four acres aforesaid, and that therefore the title to this property should have been taken to the minors aforesaid.

The complainant, Jane E. Simms, became a partner in the firm of J. L. Richmond & Company. Phillips & Flanders also agreed to become a partner in said concern. This last interest, though ostensibly in the name of Phillips & Flanders, was in reality the property of William R. Phillips. He became connected with said firm with a full knowledge of all the facts heretofore alleged as to the said trusts, and upon the express understanding that the complainant, Jane E. Simms, only risked the cash capital paid in by her. This business venture resulted in two judgments against J. L. Richmond & Company, composed of *J. L. Richmond and Jane E. Simms*, one in favor of William R. Phillips, for \$3,500 00 principal, and \$612 50 interest to June 20th, 1872, and the other in favor of Phillips & Flanders, for \$4,025 70 principal, and

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\$634 04 interest to June 20th, 1872. The executions based upon these judgments have been levied upon the city lot, and the one hundred and twenty-four acres aforesaid, as the property of Jane E. Simms.

Prayer that the interests of the various *cestui que trusts* be established by the decree of the court, and that in the meantime said executions be enjoined.

The defendants, Phillips & Flanders, and William R. Phillips, answered the bill, denying all notice of the aforesaid trusts and setting up the good faith of the advances made by them to J. L. Richmond & Company, which constituted the basis of the aforesaid judgments.

Several affidavits were introduced by the complainants in support of their bill.

The chancellor enjoined the sale under the executions, to the prejudice of any rights of the minors aforesaid, and refused to interfere for the protection of the interest of Jane E. Simms.

The complainants and defendants both excepted to said decision, and now assign the same as error.

PEEPLES & HOWELL; GARTRELL & STEPHENS, for plaintiffs in error.

COLLIER & COLLIER; P. L. MYNATT, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendants, praying for an injunction to restrain the sale of certain described property which had been levied on as the property of Mrs. Jane E. Simms, on the ground that it was trust property and not liable to be sold in satisfaction of her debts, for the reasons alleged in complainants' bill. On hearing the application for the injunction prayed for, the presiding judge granted it, restraining the sale of the property levied on, to the prejudice of whatever rights the complainants, Emily E. Simms, Sarah F. Simms and Jane E. Simms, minors, may

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have in and to the same, and refused the injunction to restrain the sale of whatever interest Jane E. Simms, the adult complainant, may have in the property, whereupon both parties excepted. In considering the allegations in the complainants' bill, and the affidavits in the record in support thereof, we find no error which will authorize this court to interfere with the discretion exercised by the presiding judge in granting the injunction as to the rights of the minor *cestui que trusts* in the property. But inasmuch as no specified interest in the property was levied on by the sheriff as the property of Mrs. Simms, the defendant in execution, and the entire property being levied on as hers, it was error in the court in not restraining the sale as to her interest in the property until the final hearing of the cause, it not appearing from the levy of the sheriff what her interest in the property was, and could not be ascertained, according to the allegations in the bill, until the final trial was had. The objection is, that the levy of the sheriff does not describe what interest in the property he levied on as the property of Mrs. Simms, and there is nothing in the record which enables us to see what will be the extent of her interest in the property until the rights of the parties shall be finally adjudicated. The question involved in this branch of the case comes fully within the principle recognized and decided by this court in *Whally vs. Newsom*, 10 *Georgia Reports*, 74; see Code, 3640.

Let the judgment of the court below be affirmed granting the injunction, and reversed as to the refusal to grant it restraining the sale of Mrs. Simms' interest in the property.

JOHN S. ALLEN, plaintiff in error, *vs.* SUSAN L. JONES, defendant in error.

The verdict of the jury in this case does full justice to the parties, and although the charge of the court is objectionable, yet we are of the opinion that there was no abuse of discretion in the refusal of the court below to grant a new trial.

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New trial. Before Judge KIDDOO. Schley Superior Court.
April Term, 1873.

Susan L. Jones sued out a distress warrant against John S. Allen, for the sum of \$238 51, besides interest, for rent. The usual counter-affidavit was filed and bond given.

Upon the trial of the issue thus formed substantially the following evidence was introduced:

T. B. Myres, sworn: Witness, as the agent of the plaintiff, rented a small farm in Schley county to the defendant for the year 1870, for five bales of cotton. The defendant remained on the place during the year 1871, without any special contract. Witness, in the fall of the latter year, agreed with defendant upon four bales of cotton as the rent for said year. He was to be allowed pay for all repairs and improvements placed on the farm during both years; these did not amount to exceeding \$50 00 in value.

The defendant testified that there was no special contract for the rent for either of the years 1870 or 1871, in which he was corroborated by his son, Bob Allen, who was present during the conversation between his father and Myres, as the agent of the plaintiff, at which the rent contract for the year 1870 is alleged to have been made. The defendant further stated that he rented the place from plaintiff's agent without any contract, except that he was to pay reasonable rent therefor; he to be allowed reasonable pay for all repairs and improvements; that he remained for the two years without any other agreement, and made repairs and improvements to the amount of \$265 00; that the place was in bad repair when he took possession thereof; that he greatly increased its value by the labor expended thereon. He denied fixing the rent in the fall of 1871 with Myres, for that year, at four bales of cotton. In this last statement he was corroborated by his wife.

Myres and Glover both testified that they did not think the improvements worth more than \$50 00.

Cotton was proved to have been worth in 1870 thirteen

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and a half cents, and in 1871 sixteen cents per pound. Payments were shown to have been made by the defendant during the year 1870, amounting to \$113 00; also that Myres agreed to allow defendant \$75 00 for repairs and improvements made during the year 1870, and one bale of cotton for those made in 1871.

The jury returned a verdict for the plaintiff for \$236 51. The defendant moved for a new trial upon the following grounds, to-wit :

1st. Because the verdict was contrary to the evidence.

2d. Because the court erred in charging the jury as follows: "If you believe from the evidence that no contract or agreement fixing the amount of rent was made, then if defendant used or occupied the plaintiff's place, he would be liable for such rent as the place was reasonably worth."

3d. Because the court erred in charging as follows: "Ordinarily a landlord must keep the premises in such repair as to make them tenantable and fit for use, and is liable for all substantial improvements placed upon them by his consent. Ascertain from the evidence what were the necessary repairs, and if any substantial improvements were made, and whether they were by consent of the landlord. If there was no agreement as to the rent to be paid, and if you charge the plaintiff with repairs, then he would be entitled to such rent as the place was reasonably worth in its repaired state, and not such as the place was worth unimproved."

4th. Because the court erred in charging as follows: "If the jury believe that Myres and the defendant, in the fall of 1871, had a settlement, and settled these matters in controversy, and fixed a certain balance as due, the plaintiff would be entitled to recover that balance, reduced by any payment made after settlement or agreement."

The motion was overruled, and defendant excepted.

HAWKINS & HAWKINS, for plaintiff in error.

HUDSON & WALL, by C. F. CRISP, for defendant.

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McCAY, Judge.

We see nothing in this case to take it out of the rule we have so often announced ; it turns wholly upon the evidence, and it is not such a case as justifies us in interfering. The jury may well have found the verdict they have. The evidence, as we have it, is somewhat confused, but on a fair consideration of it we do not think it wholly fails to sustain the verdict.

Judgment affirmed.

AARON BARNETT et al., plaintiffs in error, vs. THE CENTRAL LINE OF BOATS, defendant in error.

1. Where A, a common carrier, wrongfully and fraudulently takes goods to be conveyed to the owner, knowing that B, another common carrier, has made a contract with the owner for the carriage of the same for hire, the former is liable to the latter in damages to the amount of freight he would have earned under his contract.
2. If the owner of the goods had assigned the bill of lading to B, and the owner refuse to receive them from A, and B demands and receives the goods from A, and then deliver the same to the owner, who accepts them, such carrier so delivering must assert his claim for the freight against the owner.
3. But if B, in order to obtain possession of the goods, has been compelled to pay A the amount for freight which the owner was to pay him, he is entitled to recover back the same from A.
4. If the goods, when received by B and delivered to the owner, were damaged so that the owner had a right to recoup for the damages against B's claim for freight, B may recover the amount of the damages from A.
5. Would B, in this case, by reason of his special property in the goods arising out of the assignment of the bill of lading to him and his lien on the goods for his claim for freight, have a right of action against A for the damages? Quere.
6. There being no evidence in the record showing that defendants in error had any right to claim freight on the coal, or what amount of damages was done to the hay, and they not being entitled to recover from plaintiff in error the amount which was paid for freight from New York to Apalachicola, the verdict is too large, and the judgment is reversed with instructions.

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Carriers. Freight. Recoupment. Damages. Before Judge JAMES JOHNSON. Muscogee Superior Court. April Term, 1873.

The Central Line of Boats brought case against Aaron Barnett and Daniel Fry, as the owners of the steamboat New Jackson, making, substantially, the following case :

It claimed to be a common carrier, using certain boats on the Chattahoochee river, from Apalachicola to Columbus. Conant & Young shipped on the schooner Lizzie Major, from New York to the port of Apalachicola, consigned to William H. Young, or to his order, six hundred and thirty-six bales of hay, to be delivered to said Young, his order or assigns. Plaintiff agreed, for a certain reward, to receive the hay at Apalachicola and to deliver fifty bales at Wright's landing, one hundred bales at Eufaula, and the balance at Columbus. Said Young assigned bills of lading to plaintiff, and directed the master of the schooner to deliver the same to it. Whereupon the plaintiff dispatched one of its steamers to Apalachicola to receive said hay and deliver the same as it had agreed to do. It exhibited to the master the direction of said Young, and offered to pay him the freight due. But before that time the defendants, knowing the premises, but contriving and fraudulently intending to injure the plaintiff, and to deprive it of the hire and reward it would have received from the carriage of the hay, falsely represented to the said master of the schooner that they were authorized to receive said hay, by means whereof and the agreement of defendants to receive it in a damaged condition, the said master was induced to and did deliver the said hay to the defendants. Plaintiff demanded it from them, and offered to pay the charges of the schooner, but defendants, intending to deprive the plaintiff of the hire and reward it would have received, and intending to prevent it from fulfilling its undertaking with said Young, refused to deliver, but carried the hay on their boat and left at Eufaula one hundred and eight bales in a damaged condition, and ninety-two sound bales at same place, and brought up

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the balance to Columbus, and offered to deliver to said Young, who declined to receive the same, having given plaintiff an order and holding it responsible for the delivery. Plaintiff then again demanded said hay of the defendants, who again refused to deliver it unless plaintiff would pay them \$458 29, without having an opportunity to examine the same as to condition or quality, which sum plaintiff then paid under protest, and received of said hay one hundred and thirty-two bales badly damaged, thirty-one damaged, and two hundred and fifty-six sound. By which premises plaintiff was deprived of the hire and reward it might and would have received for the carriage of the hay, and also \$458 29 which it was compelled to pay, and \$50 00 for hire earned by it in carrying the fifty bales to Wright's landing, and \$500 00 damages paid to said Young for injury to the hay and for nineteen bales converted by defendants.

The second count was similar, except it is in respect to seventy-two tons of coal, consigned to D. J. Willcox, at Columbus, which was brought to Columbus by defendants and delivered to plaintiff, upon payment of \$290 00 freight.

Defendants pleaded the general issue.

EVIDENCE FOR PLAINTIFF.

Charles I. Hockstrasser, sworn, says: He was captain of steamer New Jackson, one of the boats of the Barnett line, in March, 1870; the boat was at Apalachicola, Florida, when the vessel Lizzie Major arrived; witness went out in the bay in a yawl to the vessel, and the captain reported his vessel to be in distress, the cargo to be damaged, and the anchors lost. The captain proposed to witness to take off the hay and coal; witness and the captain went up to town together in the yawl; the captain had doubts about shipping the hay and coal on the boat; witness supposed he had heard that the Central Line of Boats had an order for the hay and coal. The captain came on the boat and went back into the cabin with A. Barnett and Daniel Fry, and they had a conversation; witness was not present; after some twenty minutes the captain came out and told wit-

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ness he would ship the freight on the boat; witness went down next morning with the boat to the vessel, which lay some six miles off, and took on the hay and coal; some of the hay was damaged; no survey was held; was two or three days taking on the hay and coal; when the boat went back to the town, and just before she was ready to start up the river, saw a boat's smoke up the river—supposed it was the Atlanta, a boat of the Central Line of Boats, and supposed the boat had an order from the owners for the hay and coal. Barnett saw the smoke, and told witness to hurry up and get off—he did so because he wanted to start before the Atlanta arrived; he supposed the Atlanta was coming down after the hay and coal. The best of his recollection is that the freight on the hay and coal to Columbus was between \$500 00 and \$600 00; the New Jackson brought up the hay and coal; left over one hundred bales of hay at Eufaula, by order of W. H. Young, the consignee. The order was directed to the Central Line of Boats; there was no order from W. H. Young to the boat to deliver; brought the balance to Columbus and offered it to W. H. Young; Mr. Young declined to receive the hay; Mr. Willcox, the consignee of the coal, received the coal and paid the freight; the agent of the Central line received the hay and paid the freight and charges at Columbus; there were seventeen bales of hay; there was a lot of hay in bulk on the boat; the bales had burst in handling; this bulk represented the seventeen bales; Mr. Young declined to receive it, and the agent of the Barnett line sold it, and has the proceeds.

Cross-examined: Says he knows of no fraud or representations made to the captain of the Lizzie Major to induce him to ship the freight on the New Jackson; the captain proposed to ship it; he, witness, did not propose to take it; the captain of the Lizzie Major shipped the hay and coal because his vessel was in distress, and having only one small anchor he feared the vessel might be blown out to sea; his recollection is the freight was fifty to seventy-five cents per bale on hay; does not remember about coal.

..... Whitesides sworn, says: The Atlanta was sent down

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from Bainbridge to Apalachicola ; it would take three days to make the trip and return ; the expense of the boat was about \$120 00 per day ; the boat brought no freight from Apalachicola ; did not get a full load on the trip ; could have brought up the hay and coal with the load without extra expense ; the freight on the hay was to be paid at fifty cents per bale, and coal at \$4 00 per ton ; does not remember number of bales of hay ; there were seventy-two tons of coal.

Charles Green sworn, says : The bills of lading produced are the originals received by Mr. Young for hay shipped from New York to Apalachicola by schooner Lizzie Major, and the entries on the back were made by direction of Mr. Young. He, as agent of Mr. Young, made a contract with the Central Line of Boats to bring up the hay. The boat was to receive fifty cents per bale ; there were six hundred and thirty-six bales. The agent of the Barnett line had proposed to bring the hay, but he informed the agent that he had contracted with the Central line. This was a week or two before the Lizzie Major arrived. Mr. Young refused to receive the hay from the defendants.

The bills of lading were then introduced, with the refusal of Mr. Young indorsed thereon, to receive the hay from the defendants, for the reason that he had delivered an order to the plaintiff for the same.

The defendant, Barnett, testified by answers to interrogatories, as follows : Charles J. Hockstrasser was captain of the steamboat New Jackson in February and March, 1870 ; I do not remember who was captain of the Atlanta at the time, or of the Lizzie Major ; I do not of my own knowledge know in what condition the Lizzie Major was when she arrived at Apalachicola ; she was loaded ; the steamer New Jackson received the freight of said vessel. The circumstances under which she took the freight were as follows, viz : I was in Apalachicola, Florida, some time during the months of February and March, 1870, and while there Captain Hockstrasser, of the steamer New Jackson, learning that a vessel had arrived in the bay, loaded, took the steamer's yawl and went out to

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her; on his return, he reported the vessel in distress. About the same time the captain of the vessel came up to the town, and stated that the vessel was in distress, as well as his fears that should a storm arise the vessel and cargo would be lost, and therefore arranged with Captain Hockstrasser to take it up the river to its destination.

The contract in reference to the freight was made between the captains of the vessel and steamer, and a proper bill of lading signed, by which the captain of the vessel was the shipper; where the freight was to be carried to, or to whom delivered, or at what rate, I cannot now remember. The condition of the contract was, that if the captain of the vessel received orders from the consignees of the freight to deliver the cargo at the wharf at Apalachicola, the captain of the steamer agreed, on demand of the shipper, who was the captain of the vessel, to deliver the same at the wharf, in which event the captain of the steamboat was only to charge a reasonable compensation for what the services were worth; this demand was not made to my knowledge.

At the time that the New Jackson received the freight the vessel was lying in the bay of Apalachicola, about three or four miles from the wharf. The New Jackson remained in the bay receiving the freight two or three days, and at the wharf of Apalachicola. A short time only elapsed between the arrival of the Atlanta and departure of the New Jackson; I do not remember exactly how long.

The captain of the New Jackson conferred with me as to the cargo, and I advised him, as I would at any time, not to refuse freight. A short time before the departure of the New Jackson, Mr. Stevens, who, I believe, was the clerk of the steamer Atlanta, came to me on the wharf, and said, "I demand this freight." I replied to him simply that I supposed the New Jackson was in possession of the cargo legally, and had signed a proper bill of lading for it.

No authority to receive the freight was exhibited to me by any officer of the steamer Atlanta, nor was any exhibited to the captain of the New Jackson, as far as I know. I did not

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go up the river on the New Jackson, but supposed the freight was delivered as consigned. I know of no damage that could have occurred to the steamer Atlanta in the matter further than the disappointment in securing the freight, which was a matter of common occurrence to all steamboats. The Atlanta was in the prosecution of her regular trade at the time.

I had no authority to receive either the hay or coal, nor do I know that the steamer New Jackson had any from the consignees. I was a passenger on the boat at the time. I know nothing as to delivery of the freight. I urged the captain of the New Jackson to hurry his preparations in leaving Apalachicola, because the boat had already been detained there several days in taking in the cargo, and the receipts from freight on the same would hardly pay expenses, and no other reason that I know of; I did not know that the smoke was that of the Atlanta, or of what boat, and urged the departure of the New Jackson promptly for the purpose of saving time. I was a part owner of the steamer New Jackson at the time.

The jury returned a verdict for the plaintiff for \$743 86. The defendants moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and defendants excepted.

PEABODY & BRANNON, for plaintiffs in error.

R. J. MOSES, for defendant.

TRIPPE, Judge.

1. The Central Line of Boats, as a common carrier, had contracted with Young, the consignee and owner of certain goods shipped from New York to Apalachicola, to receive and carry the goods from the last mentioned place to Columbus, Georgia, leaving certain portions of them at Eufaula and Wright's landing, *en route*. The bill of lading was assigned to the carrier with a special order for the delivery of the goods. The declaration charges that plaintiffs in error, knowing this, wrongfully and fraudulently obtained the goods from the ves-

sel which had brought them to Apalachicola, and thereby deprived the defendant in error of the freight which it would have earned under the contract. Is the former liable to the latter in an action for damages? Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action: Revised Code, sec. 2957. In 2 Chitty's Pleadings, 691, the form of a declaration is given in a case in which plaintiff had a verdict, where the defendant, who was a wharfinger, falsely represented to the person, (master of a ship,) who was in possession of the goods directed to plaintiff's wharf, that he was authorized to receive them, etc., whereby plaintiff was deprived of the profits of storage, wharfage, etc. Also one against a defendant for representing that plaintiff's wagon set out from his inn, by means of which he obtained possession of and sent by another wagon, two parcels, which plaintiff had contracted with the owner thereof to carry for hire, to a certain place. When the plaintiff below contracted with the owner of the hay for its transportation, and received an assignment of the bill of lading, it had a right to demand and receive possession of the hay, and to carry it to its destination, and to be paid for the same. When the defendants got it they deprived him of this right, and if they wrongfully acted, there were both *injuria et damnum*. It was a tort, an invasion of the legal right of another: Code, section 2951.

2. When the owner refused to receive the hay from plaintiffs in error, and the Central Line of Boats demanded and received it from them, and delivered the same to the owner who accepted it, the owner was bound to pay the carrier thus delivering, the freight on the same, and such carrier must assert his right therefor against him. This would be the general rule.

3. But if the Central line, in order to obtain the possession, was compelled to pay to plaintiffs in error the amount for freight which the owner was to pay, then the Central line was entitled to recover back such amount from them. It would not be like the case of a voluntary payment. Money

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paid to obtain possession of property which the party making the illegal demand has under his control, can be recovered back : 4 Metcalf, 189 ; 7 B. & C., 73 ; 2 *Ibid.*, 729 ; 7 Greer, 134 ; 9 John., 201 : See *Elliott vs. Swartwout*, 10 Peters, 137 ; 4 Term Reports, 485 ; 1 Taunt., 358. Nearly all these cases recognize the distinction between a voluntary payment and payment made under compulsion.

4. It would seem to be a pretty clear proposition, that if the hay, when it was received by the Central line from the other carriers, was damaged so that the owner could recoup therefor against its claim for freight, then the Central line would be entitled to recover from them for such damages. We do not say whether the damage to the hay was recoverable against the owner of the vessel that brought it to Apalachicola, or that any carrier was responsible for it. But if the plaintiffs in error received it in a damaged condition without a survey, and paid full freight from New York, when a deduction should have been made for the damage, then they were not entitled to demand for what they had so illegally paid. And if the Central line was compelled to pay the whole amount of charges in order to get possession of the hay, without the privilege of examining into its condition, and there was such damage that the owner had a right to set it up against the Central line's claim for freight, it had a right to go back on the Barnett line for indemnity.

5. Would the Central Line of Boats, by reason of its special property in the hay, arising out of the assignment of the bill of lading, and its lien on the hay for its claim for freight, have a right of action against plaintiffs in error ? Quere.

6. We have said nothing thus far as to the coal. There is no evidence in the record that the contract with the Central line covered the coal, nor is there any transfer of any bill of lading therefor, or any proof of any order for it given to the Central line. The owner of the coal accepted it from the defendants below, and paid them the freight on it. There was likewise no proof of what amount of damage was done to the hay, so that a jury could ascertain, with any reasonable cer-

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tainty, what to find therefor. Nor can we say, from the evidence, that the amount paid for freight from New York to Apalachicola should be included in the recovery. It is almost impossible to tell what items the jury did find for in their verdict. We are satisfied it is too large, and as we do not see that, as the evidence appears in the record, the verdict should have been for more than the freight on the hay from Apalachicola to Columbus, which, at fifty cents per bale, would be \$318 00, it is directed that if the defendant in error will write off all except that amount, the judgment shall stand affirmed for that sum, otherwise a new trial is granted.

Judgment reversed, with instructions.

**B. J. WILSON & COMPANY *et al.*, plaintiffs in error, vs.
WILLIAM A. WILKINS, defendant in error.**

Where the evidence is conflicting, and no error of law is committed, the discretion of the superior court in refusing a new trial, will not be controlled.

New trial. Before Judge GIBSON. Burke Superior Court.
November Term, 1873.

For the facts of this case, see the decision.

L. E. BLECKLEY; H. H. PERRY, for plaintiffs in error.

A. M. RODGERS, for defendant.

WARNER, Chief Justice.

The plaintiffs ruled the defendant, as an attorney at law, in the court below, for money which they alleged he had collected for them from Connelly and retained. The defendant, in his answer, alleged that he was entitled to the amount of money retained in his hands as fees due him for professional services. The plaintiffs traversed the answer of defendant,

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on the trial thereof, the jury, under the charge of the court, found a verdict for the defendant. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and strongly and decidedly against the weight of the evidence, and for error in the charge of the court, which motion was overruled, and the plaintiffs excepted.

It appears from the evidence in the record that the plaintiffs placed a large claim in the hands of defendant for collection against Connelly, and that defendant also had in his hands a large claim of Miller for collection against Connelly. That defendant, with the consent of the plaintiffs, negotiated a settlement with the respective parties in relation to their claims, whereby Miller became the purchaser of Connelly's land, and paymaster to the plaintiffs for \$10,000 00. All parties are willing to abide by the settlement made, and the only question in dispute at the trial was as to the amount of fees retained by the defendant for his trouble and expense in negotiating the settlement. There is a good deal of evidence in the record in relation to the insolvent condition of Connelly, the character of the plaintiffs' and Miller's claims, and as to the labor and professional services of the defendant, and the value thereof in effecting the settlement. In relation to the value of the defendant's professional services the evidence was conflicting. The charge of the court complained of is as follows: "That the court could see nothing wrong (provided it was done in good faith) in an attorney acting as the friend of all parties in getting up a settlement and preventing litigation; that an attorney may, in a settlement, lawfully represent the claims of opposing creditors, if he acts fairly and in good faith, and especially may he so act with the knowledge of the creditors." We see nothing in this charge of the court which could have injured the plaintiffs' case, although there is not much law in the first part of it, and might well have been omitted. The alleged error in the charge of the court is merely *colorable* to evade the repeated rulings of this court in not interfering with the verdicts of juries when the evidence is conflicting, and there is sufficient evidence in the re-

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cord to support the verdict. In looking through the evidence contained in this record we find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

**ROBERT BADKINS, plaintiff in error, *vs.* JOHN MEHAFFEY,
defendant in error.**

1. Where an unmarried woman was administratrix of an estate, and being sued as such, filed a plea of *plene administravit*, and pending the suit she married and her letters abated, and her husband took out letters *de bonis non* on the estate, and was made a party, and he also filed a plea of *plene administravit*, and a general judgment was had for the plaintiff:

Held, that no right of the wife was affected by the verdict.

2. Where a judgment creditor of an estate served a summons of garnishment against A, as the debtor of said estate, and A, in his answer, admitted that he had bought property at the estate sale, and gave his note to the administrator, but set up that the note had, before the service of the summons, been handed over by the administrator to a third person in payment of a judgment of the highest dignity against the estate, and that said note was still the property of said third person:

Held, that on the trial of an issue traversing this answer, it was not competent for the judgment creditor to introduce evidence to show that in the original suit between him and the administrator, it was one of the issues whether this particular note was not then in hand as assets for the payment of the plaintiff's debt, and that said issue had been found in his, the plaintiff's favor, it not appearing that either the garnishee or the person claiming the note, was a party to said issue.

Husband and wife. Administrators and executors. Judgment. *Res adjudicata*. Garnishment. Partition. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

Robert Badkins brought assumpsit against Emory S. Dennis, administrator, and Mary T. Wynn, administratrix, of David A. Wynn, deceased, upon his acceptance of \$186 65. The defendant pleaded the general issue and *plene administratio-*

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vit præter. Pending the suit Dennis died, and Mary Wynn married one Solomon Bray. Letters of administration *de bonis non* issued to him, and he was made a party defendant to said suit. He pleaded *plene administravit præter.* The jury returned a verdict for the plaintiff, and a general judgment was thereupon rendered against the defendant. Process of garnishment issued upon said judgment, which was served upon John Mehaffey. He answered that he had purchased property of said estate and was indebted by note, a balance of \$300 thereon. That this note, prior to the service of said summons of garnishment, had been set aside to the widow of the deceased as a portion of her twelve months' support.

This answer was traversed. Upon the trial of the issue thus formed the plaintiff tendered evidence to show that in the original suit between him and the representatives of the estate, it was one of the issues whether this particular note was not then in hand as assets for the payment of his debt, and that said issue had been found in his favor. This testimony was excluded by the court, and plaintiff excepted.

The court charged the jury as follows: "It was alleged by the plaintiff that the garnishee was indebted to said estate at the time of the service of the summons of garnishment. The garnishee denied it, and thereupon issue was made by the parties, which issue they were to determine from the testimony. What had transpired on the trial of the case between the plaintiff and the administrator, was not in evidence in this case. The parties were different, and this cause is to be determined by the testimony admitted in it at this trial. If the testimony showed that Mrs. Bray had an allowance made to her out of the estate of her deceased husband for a year's support, she would be entitled to retain in her hands so much of the estate as would be sufficient to pay said allowance; and further, that although the note made by Mehaffey may have been given for property purchased belonging to the estate, Mrs. Bray would have the right to appropriate so much of it as would be sufficient to pay the allowance made to her; and further, if from the testimony they should believe such allow-

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ance had been made, and that Mrs. Bray had appropriated only so much of the note as was sufficient to pay it, the garnishee was not indebted to said estate; and if such was not the case, then he was indebted."

To which charge plaintiff excepted.

The jury found for the garnishee.

Error is assigned upon each of the aforesaid grounds of objection.

L. T. DOWNING, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

McCAY, Judge.

1. We are unable to see how any right of Mrs. Bray can be affected by the judgment against her husband. Under our law, at the date of the judgment and of her marriage, she was, as to any property she had or might acquire, a *feme sole*, and a judgment against her husband was no more a judgment against her than would a judgment against any other person be. That she was one of the administrators at the bringing of the suit, and filed a plea as such, can, under the course the case took, make no difference. Dennis died and Mrs. Wynn married. The death of Dennis abated the suit as to him, and her marriage abated her letters. How far, if she had invested the assets, the plaintiff might have objected to the abatement of the suit as to her, we do not say. But her husband, Bray, took out letters, was made a party and filed a plea, and it was the issue on Bray's plea that was tried, and it is upon that and that alone the plaintiff stands. She was no party to that issue, and is not bound by it. It simply found that the plaintiff was a proper creditor of the estate, and that *Bray* had assets to pay it—that was all. It determined nothing as to any *devastavit* or as to any assets in the hands of previous administrators. Indeed, the waste of the estate by the former administrators would have protected Bray. Nor was he liable to account for his wife's *devastavit* unless he got property by her to do so, and under the law at the date of the marriage

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he got no property by her, so that it is clear to us that no right of Mrs. Bray was affected by the judgment.

2. The issue on trial in this case was whether Mehaffey owed the estate represented by Bray. That depended on the fact whether Mrs. Bray was, at the date of the summons, the owner of Mehaffey's note in her own right. Whether this was so or not, could not be proven by showing that it was proven on the trial between the plaintiff and Bray, that this very note went into Bray's hands as assets, or that the jury in that case so found. Neither Mehaffey or Mrs. Bray were parties or privies to that issue, and it is wholly immaterial to their rights what was proven or what was found on that trial. It binds Bray, and him alone. It often happens that an administrator, in a suit against him as to his *devastavit*, is called upon to show whether certain property belongs to the estate, whether the estate does or does not owe debts other than the plaintiff's, and the dignity of such debts as compared with the debt of the plaintiff. An administrator who undertakes to do this by plea at law takes the risk if the plea is found against him, of having to try the same issue, perhaps, with other parties. To avoid this, he may file a bill to marshal the assets. But if he fails to do this, he takes the risk, as other parties are not bound by a judgment to which they are not parties. We think the court was right, and that his judgment should be affirmed.

Judgment affirmed.

JOHN DOE, *ex dem.*, W. F. WILLIAMS, administrator, plaintiff in error, *vs.* RICHARD ROE, *cas. eject.*, and RICHARD YOUNG, administrator, tenants in possession, defendants in error.

Land having been given in for taxation for the year 1868 by the agent of the estate of a non-resident, he having died in the year 1860, which was subsequently sold by the sheriff for the non-payment of state and county taxes, under an execution for the same against such agent, the purchaser at such sale acquired a valid title.

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Ejectment. Taxes. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

For the facts of this case, see the decision.

PEABODY & BRANNON; W. F. WILLIAMS; A. A. DOZIER, for plaintiff in error.

INGRAM & CRAWFORD, for defendants.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff, on the demise of W. F. Williams, administrator of Enoch Johnson, deceased, against the defendant, to recover possession of the north half of a city lot in the city of Columbus. The plaintiff proved title to the premises in dispute by deed to Enoch Johnson, the intestate of the plaintiff's lessor, dated 20th January, 1859. The defendant claimed title to the premises under a sheriff's deed made in pursuance of a sale thereof, for taxes. It appears from the evidence in the record that in the year 1868 Wiley Williams gave in the property in dispute for taxes to the tax receiver, as the agent of Enoch Johnson; the following entry appears to have been made on the tax digest for 1868: "Lower town, six hundred and sixty-eighth district, G. M., Muscogee county, Georgia; Wiley Williams, agent for estate of Enoch Johnson; value of city property \$900 00; amount assessed at one per cent., \$3 60; total amount tax, \$6 30." It also appears from the evidence that Wiley Williams was in possession of the property, and controlled it when he gave it in for taxes. A tax *fi. fa.* was issued against Wiley Williams, as agent as aforesaid, for the sum of \$6 30, which was levied on the property and sold by the sheriff, on the 7th of September, 1869, and purchased by the defendant. The sheriff executed a deed to the purchaser for the property sold, in which it is recited, that in obedience to a *fieri facias* issued by Enoch Willett, tax collector, etc., against Wiley Williams, agent, the property was

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seized and sold, etc. The property was advertised to be sold for state and county taxes against Wiley Williams, agent. It also appears from the evidence in the record that Enoch Johnson died in the state of Louisiana in the year 1860, and that there had been no administration on his estate in this state until May, 1873. On the trial of the case, the plaintiff excepted to the admission of the sheriff's deed in evidence for the defendant, and also excepted to the following charge of the court to the jury: "That if the jury believe all the testimony, they should find for the defendant." There can be no doubt that this property was subject to taxation, under the laws of the state, and if it had not been returned for taxation in the manner as hereinbefore stated by the agent, it could have been assessed and sold by the tax collector, as provided by the 855th and 897th sections of the Code. But the property was returned for taxation by the party who was controlling it as agent, and the 857th section of the Code declares, that "All persons who give in property for persons not resident in the state, shall be personally liable for the taxes, as well as the principal and *his property*." The property thus given in by the agent being liable for the payment of the tax due thereon, under the law, it was properly sold for the payment thereof, and there was no error in admitting the sheriff's deed in evidence, or in the charge of the court to the jury on the statement of facts contained in the record.

Let the judgment of the court below be affirmed.

ELIZABETH EMORY, executrix, plaintiff in error, *vs.* JAMES G. SMITH, defendant in error.

When in a suit pending against an administratrix, there was no issuable plea filed, and the plaintiff took a judgment against the administratrix, personally, and, at a subsequent term of the court, moved that the judgment be set aside, and that he be permitted to take, *nunc pro tunc*, a judgment against the administratrix, as such, and it was made to appear to the court, that since the original judgment, and only a short

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time before the application was made, the administratrix had discovered that the note sued on was not the act and deed of the intestate, and that she wished to file a plea of *non est factum* to the same: *Held*, that under the facts, the court erred in allowing the plaintiff to take his judgment *nunc pro tunc*.

Judgment. Amendment. Pleading. Practice in the Superior Court. Before Judge JAMES JOHNSON. Harris Superior Court. October Term, 1873.

James G. Smith, for the use of Edwin M. Hines, brought complaint against "Elizabeth Emory, executrix of Samuel Emory, deceased," on sixteen promissory notes, dated March 11th, 1861, and due December 25th, next thereafter, signed by Samuel Emory, payable to James G. Smith or bearer, and each for the sum of \$50 00.

Judgment was rendered by default in favor of "the plaintiff" against "the defendant." Execution issued to be levied "of the goods and chattels, lands and tenements of Elizabeth Emory, executrix of Samuel Emory, deceased." A levy was made upon the property of the deceased, and an affidavit of illegality was filed by the defendant, setting up the irregularity of the judgment and execution, and that if vacated she desired to file a plea of *non est factum*, the facts to sustain which had only come to her knowledge since the rendition of the judgment aforesaid. At the term of the court to which said illegality was returned, plaintiff moved to set aside said judgment, to quash said execution, and to enter a judgment, *nunc pro tunc*, against the defendant, to be satisfied *de bonis testatoris*.

To this motion it was objected by the defendant's counsel that she had no notice thereof, and was absent; that they could not proceed safely without her presence; that she desired to file a plea of *non est factum*, the facts to sustain which had only come to her knowledge since the rendition of the original judgment. They therefore moved a continuance of the motion to the next term.

The continuance was refused, and judgment *nunc pro tunc*,

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de bonis testatoris, allowed. To which ruling defendant excepted.

JAMES M. MOBLEY; R. A. RUSSELL, by JAMES M. RUSSELL, for plaintiff in error.

L. L. STANFORD, for defendant.

McCAY, Judge.

The plaintiff in this case made a motion to vacate his judgment. This was proper enough; the judgment was one not authorized by the pleadings and evidence, and the defendant might have made the same motion. But in addition to this the plaintiff moved for a judgment *nunc pro tunc*, in accordance with the pleadings and evidence. No notice was given of this motion, and perhaps none was necessary; the defendant was in default, and the judgment asked for was the proper judgment for the plaintiff to have taken at first. But the defendant's attorney, at this stage, brings to the notice of the court a new fact, supported by the sworn affidavit of the defendant, made for another purpose, to-wit: as an affidavit of illegality to the execution. That fact is, that the defendant has a good defense to the plaintiff's claim, and that this defense has only lately come to her knowledge. The plaintiff seeks to amend his proceedings. It is not simply a case where he asks the court to correct the misprision of the clerk—to make the minutes speak the truth of what actually transpired. The judgment, as it is, is the very judgment the plaintiff took; the mistake was a mistake of his own, and the leave he asks is to correct his own mistake. Why should he not be put upon terms—why should the court permit a judgment to be taken with the fact made apparent that the defendant may, by motion for a new trial, set it aside? Assuming what is stated in the affidavit to be true, the defendant would have an unquestionable right to move for a new trial. He presents a case coming clearly within the provisions of that section of the Code allowing motions for new trial to be made in certain cases after the term.

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As the plaintiff, in the condition of his case, was compelled, in effect, to take a new judgment, we think not only the public convenience but justice to the defendant required the plaintiff to be put upon terms, to-wit: to take his judgment if the defendant failed in the plea. The only question of doubt is, whether the defendant showed proper diligence in not being there ready to put in the plea. But it must be remembered that there was no notice given of this motion. The illegality had been dismissed, and she had a right to suppose that she would be driven to her bill in equity. So that she cannot fairly be said to be in *laches*.

Judgment reversed.

THE ATLANTIC AND GULF RAILROAD COMPANY, plaintiff in error, *vs.* THE JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY, defendant in error.

The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal.

Attachment. Principal and agent. Corporation. Acknowledgment of service. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

For the facts of this case, see the decision.

HENRY L. BENNING; LOUIS GARRARD, for plaintiff in error.

R. J. MOSES; M. H. BLANDFORD, for defendant.

WARNER, Chief Justice.

The plaintiff sued out an attachment against the defendant, a foreign corporation, which was levied on its property. The plaintiff filed its declaration, founded on the attachment thus

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levied, and the defendant, by its agent, made the following acknowledgment of service thereon :

"GEORGIA, MUSCOGEE COUNTY : We acknowledge due and legal service of the within declaration, and waive copy process and written notice of the pendency of the attachment and the proceedings thereon, and all further service, this 12th day of May, 1873.

"L. E. O'KEEFE, agent J., P. and M. R. R. Co."

At the trial, the court refused to allow the plaintiff to take a general judgment against the defendant on the above acknowledgment of service by its agent on the attachment declaration ; whereupon the plaintiff excepted. The plaintiff offered in evidence an instrument in writing by which O'Keefe was appointed the general and local agent of the defendant, at Columbus, Georgia, and also proved that he was acting as such agent for the defendant at Columbus when the acknowledgment of service was made by him.

It has been held by this court that a foreign corporation doing business in this state, may be sued by service of process on its agent located here and transacting its business, and in our judgment such agent may acknowledge service of the writ and waive process : See section 3369 of the Code. If a foreign or domestic corporation, may be sued by service of process on its agent, it would seem to follow that such agent may acknowledge service of the writ and waive process, the more especially when, as in this case, the defendant does not dispute the agent's authority to do so. It was, therefore, error in the court in refusing to allow the plaintiff to have a general judgment entered against the defendant on the statement of facts contained in the record.

Let the judgment of the court below be reversed.

Grant *vs.* Cosby.

JOHN T. GRANT, plaintiff in error, *vs.* HENRY H. COSBY,
defendant in error.

1. A purchaser of a homestead set apart under the act of 1868, takes it subject to any judgments against the head of the family, existing at the time of the purchase, if they be founded on contracts entered into by him previously to the adoption of the constitution of 1868.
2. Whether such purchaser is subrogated to the right of the debtor to set up the homestead allowed by the Code or by the act of 1823? *Quare.*

Homestead. Judgments. Before Judge JAMES JOHNSON.
Talbot Superior Court. September Term, 1873.

John T. Grant obtained judgment against Amos & Walton at the March term, 1867, of Talbot superior court, for \$123 00 principal, \$18 29 interest to that date, and costs of suit. On December 30th, 1868, the execution based on this judgment was levied upon a lot as the property of Amos. Sale was suspended on account of a homestead having been set off to the family of Amos on February 1st, 1869. On June 2d, 1873, Cosby filed a claim to the property levied on. This claim was based on a conveyance for a valuable consideration to Cosby by Amos and his wife, of the homestead, dated January 22d, 1872. The court charged the jury that under the aforesaid circumstances the lot was not subject to the execution, and a verdict was returned accordingly. Plaintiff excepted to said charge.

W. A. LITTLE; E. H. WORRILL, for plaintiff in error.

MARION BETHUNE; J. M. MATTHEWS, for defendant.

McCAY, Judge.

1. This case was decided by the court below before the publication of decision of the supreme court of the United States in *Gunn vs. Barry*, and must be controlled by it. The debt and the judgment were both in existence before the homestead was laid off, and before the constitution of 1868, providing for the \$2,000 00 homestead, was adopted; and as

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to this creditor, the effect of the homestead clause is to impair the obligation of the contract of the defendant with him.

2. It was argued that the purchaser of the homestead was, as this was a town lot, entitled to stand in the shoes of the debtor, and as he would be entitled to have \$500 00 of the proceeds invested in a homestead, that the jury might decree the property to be sold, and such disposition made of the proceeds as would substitute the claimant to that right. But no such point was made on the trial, and the pleadings were not put in a shape to authorize such a decree, even if the claimant were entitled to it. Nor did sufficient facts appear to justify it. It may be that the defendant has plenty of other property, and we think the homestead of the Code is only allowed when the debtor is insolvent. We do not, therefore, decide the question made, though a strong argument may, as I think, be made in favor of such right. It is not clear to *me* that the act of 1868 is void against any old debt, except in cases where it has operated to impair the obligation of the contract he holds, and if the homestead actually obtained by the debtor be no more than was allowed him under the law at the date of the contract, I do not see how his contract is impaired. Nor is it clear to me that the act is void as to any particular creditor, except so far as it impairs the contract, so that the argument is a fair one that a homestead under the act of 1868, is good even against an old debt when it is no larger than was allowed by law at the date of the contract, and good also for as much as was allowed, and only void for the excess. If this be so, the claimant has a legal right to \$500 00 of this lot, and in all cases a purchaser would have a right to have the fifty acres allowed by the act of 1843 set off out of the tract. His money has bought the debtor's homestead, and has been, perhaps, invested in another homestead, and I can see great equity in this subrogation. The supreme court of the United States has only power to say that the law of a state is void in so far as it interferes with the creditor's contract. If it does not interfere in the particular case or only interferes partially, it is only void so

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far as it does interfere. This, however, is only my own view, and the court is not responsible for it.

Judgment reversed.

WINNY STRONG *et al.*, plaintiffs in error, vs. MILLY MIDDLETON, defendant in error.

Samuel Strong died testate in 1828. By the fourth item of his will, executed in that year, he gave to his wife, Ann Strong, certain slaves and a tract of land, and divers other articles of personal property—"forever to do with as she pleases in fee simple." By the fifth item he gave to his minor son, William, and to his heirs forever, certain slaves, and also the plantation whereon testator resided. The seventh item is as follows: "I lend to my beloved wife, Ann Strong, as long as she remains a widow, or during her natural life, nine negroes, to-wit: Darby, Mariah, Rachel, Isaac, Nancy, Frank, Knob, Jacob and Burton. Also, the use of my land and plantation whereon I now live, together with all my stock of every kind; my household and kitchen furniture, and everything on or belonging to my house or plantation, and it is my desire and will that my beloved wife keep peaceable and quiet possession of my house and plantation as it now is, keeping all together; and if my beloved wife should not marry, but remain single until my son, William Strong, comes of age, then I wish all the property I have lent to my wife to be equally divided between my said wife and my said son William, and for my said wife to hold her part until she either marries or dies, and at her marriage or death which happens first, then the part I have left her I give to my son William and his heirs forever; and if my said son William should die without a lawful begotten heir of his body, then I give all the negroes I have given him, to-wit: Winny, Nancy, Buck, Harry, Shibo and Gilbert, and one-half of the tract of land whereon I now live to the agent of the Colonization Society wherever he may be, in trust for the Colonization Society, for them to send the said negroes with their increase, to Liberia, Africa, that they may be free, and the money arising from the sale of the land to bear their expenses and support them one year when there. My will is for my wife, Ann Strong, to hold the other half of my land with the house and houses, stock of all kind, furniture and all things and articles therunto belonging during her life, and at her death for all the negroes that I lent her, I give in trust to the above named agent of the above named Colonization Society, for them to send such said negroes to Africa to be free and the other half of this land to bear their expenses and support when there." The negroes mentioned in

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this item as being loaned to Mrs. Strong, are not those given her absolutely in the fourth item. Ann Strong, the widow, married in 1830, William then being a minor. William, after the marriage of his mother, went into possession of the land mentioned in the fifth and seventh items, and continued in possession until 1867, when he died, and, as alleged, "without a lawful heir of his body begotten :"

Held, that at the marriage of Mrs. Ann Strong, William took an absolute estate in the land mentioned in the fifth and seventh items.

Will. Estate. Before Judge ANDREWS. Oglethorpe Superior Court. April Term, 1873.

Winny Strong and others brought complaint against Milly Middleton for the land mentioned in the fifth and seventh items of the will set forth in the above head-note, alleging that Ann Strong, the widow of the testator, married in the year 1830, while William Strong, the son of the testator, was still a minor; that after said marriage said William went into possession of the land in controversy, and continued in possession until the year 1867, when he died without a lawful heir of his body begotten ; that plaintiffs are the negroes, and the heirs of those who are dead, mentioned in the seventh item as to be sent to Liberia and made free ; that plaintiffs, prior to the death of the said William, became free by the laws of the United States and of the state of Georgia ; that they do not desire to go to Liberia but prefer remaining in the state of Georgia, and therefore pray that said land may be adjudged to belong to them, and that they may be placed in possession of the same.

The defendant demurred to the declaration upon the following grounds, to-wit :

1st. Because the estate claimed passed only to the agent of the Colonization Society.

2d. Because no suit could be brought under said will for said land for the benefit of plaintiffs, except by the executors of Samuel Strong.

3d. Because neither of the plaintiffs, nor any of them, took any right, estate or interest in said land.

The court sustained the demurrer as to the half of the land

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mentioned in the first part of the seventh item, and overruled it as to the other half. Both parties excepted, plaintiffs assigning error upon said judgment as to the first half, and defendant as to the second half.

E. C. KINNEBREW, for plaintiffs in error.

W. M. & M. P. REESE; JOHN C. REED, for defendant.

TRIPPE, Judge.

Did the interest that Mrs. Strong took in the land mentioned in the seventh item of the will determine by her marriage, and if so did the fee, under the terms used in the will, vest in William Strong? An affirmative answer to these questions settles this whole case, or rather, both of these cases, and we think that the answer must be in the affirmative. By the fourth item of the will certain slaves, a tract of land and divers articles of personal property were given to Mrs. Strong, to be hers "forever, to do with as she pleases, in fee simple." Thus there was considerable property given to her absolutely, unaffected by her marriage or death, except as she might, by her own volition, dispose of it. This item does not touch the land in question. The next item does cover this land. It gives the land to his minor son, William, and his heirs forever—a pure fee simple, in unambiguous terms. By the seventh item he further gives to his wife certain other slaves, and encumbers this devise of the land to William by giving the use thereof to his wife during life or widowhood, to keep possession thereof if she remained single and unmarried until William became of age, then it was to be equally divided between the mother and son, and she was to hold her part until she married or died, and whichever happened first then her part thereof he gave to his son William and his heirs forever. Thus the testator first gave the fee to his son. The other provisions clearly show that he did not intend the fee to be encumbered by any interest in the mother, only whilst she was a widow, and that whenever she married the use given to her

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was to determine. There is a conflict in the provisions of the will, take it as you may. The construction we give it is the only one that seems to be consistent with the leading intent of the testator, to-wit: the widow was to take nothing of this land from the son, to whom it had already been devised in fee, unless, and only whilst she was a widow. This seems to be the construction which plaintiff's counsel put on the will, as is inferred from the declaration, and also was recognized by the court below in deciding on the demurrer. As to the disposition made in the latter part of the seventh item, of Mrs. Strong's half of this land at her death, it is in direct conflict, not only with the disposition made of it in the fifth item, but also with the remainder created in it to William in the previous part of the seventh item. Was not this portion or part of the land that was to go over on the death of Mrs. Strong to the Colonization Society, an interest that she was to have if she remained single until William attained majority, and continued single until her death? Take all the sentences together and it appears that the *halves* referred to were only those halves into which the land was to be divided if Mrs. Strong remained single. But Mrs. Strong did not remain single, and the fee vested absolutely in William by the express terms of the will at her marriage. The limitation over, if William should die without a lawfully begotten heir of his body, is void, as being too remote. In *Wallis and wife vs. Garrison*, 33 *Georgia*, 341, the bequest was to the wife, and "should she die without a natural heir of her body," then over. It was held that the wife took an unconditional estate. In *Hose vs. King*, 24 *Georgia*, 424, the words were: "and if she (the first taker) should die without leaving a lawful heir of her body," then the property was to go back to testator's estate, and they were construed to give an absolute estate to the daughter, who was the first taker: See 17 *Georgia*, 280; 20 *Ibid.*, 804; 21 *Ibid.*, 377; 28 *Ibid.*, 378. The question is not an open one, as to such cases as spring out of instruments which were operative before the adoption of the Code. Whatever difficulties may have been created by the two cases

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referred to in 30 *Georgia Reports*, there have been several later ones which fully recognize the former rulings. Our conclusion is, that the decision of the court below in number three be affirmed, and reversed in number four.

**JOHN QUIN *et al.*, plaintiffs in error, vs. TABITHA GUERRY,
defendant in error.**

The evidence in this case being conflicting, a new trial was properly refused.

New trial. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

For the facts of this case, see the decision.

R. J. MOSES, for plaintiffs in error.

HENRY L. BENNING, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants as securities on a sheriff's bond. The jury found a verdict for the plaintiff for \$279 69. A motion was made for a new trial, on the grounds that the verdict was manifestly against the weight of the evidence, and because it was against the law as given in charge by the court. The motion was overruled by the court, and defendants excepted. The charge of the court to the jury is not in the record. The plaintiff proved by two witnesses that the sheriff had collected the money for her, and said he would pay it to her when she wanted it; she told the sheriff she would not want it until the next Monday; this conversation was on Saturday. The sheriff died on Monday with the money in his hands; his death prevented the plaintiff from getting the money on Monday. A witness for defendant stated that plaintiff told him

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that the sheriff had tendered her the money; she told him she did not need it then, but would call on him when she wanted it to buy corn and meat; was sorry she had not taken it when he offered it to her. The evidence was conflicting, and that was a matter exclusively for the consideration of the jury, even if the facts proved by the defendants' witness would, under the law, have discharged the defendants from their liability as sureties.

Let the judgment of the court below be affirmed.

ALFRED AUSTELL, plaintiff in error, *vs.* **ELIZABETH McLARIN et al.**, defendants in error.

A suit was brought on a joint and several promissory note against two parties who lived in different counties. No service was made upon the defendant residing in the county of the location of the suit until after the first term. At the second term a verdict and judgment was taken against the non-resident defendant alone:

Held, that the verdict and judgment was illegal, and equity will enjoin its enforcement. In such a case the non-resident defendant has a right to insist upon a verdict and judgment against his co-obligor at the time they are taken against him.

Joint and several obligation. Principal and security. Service. Judgment. Before Judge BUCHANAN. Campbell county. At Chambers. December 1st, 1873.

A. S. Gorman, a non-resident, and James M. Gorman, of Douglass county, as principals, and Alfred Austell, of Fulton county, as security, made their joint and several promissory note to Elizabeth McLarin, or bearer, on the 24th of January, 1872, for \$4,000 00, due the 25th of December thereafter. Elizabeth McLarin instituted suit on said note in the superior court of Douglass county to the April term, 1873. A second original and copy, with process, was issued for Fulton county, and served on Austell, in Fulton county, on the 3d of April, 1873. No copy or process was issued for or served on James

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M. Gorman, the resident debtor, of Douglass county. At the term to which said case was made returnable, an order was taken to perfect service on said James M. Gorman, and he was served on the 6th day of May, 1873. At the October term, 1873, a judgment was rendered by the court against Alfred Austell, the security, of Fulton county, for the sum of \$4,000 00 principal, and \$233 00 interest, with costs of suit. On the 22d day of October, 1873, an execution was issued, and transferred from Douglass to Campbell county, and levied on the land of said Austell, which was advertised for sale on the first Tuesday in December, 1873. On the 24th of November, 1873, said Austell filed his affidavit of illegality, in terms of the law, predicated on the facts aforesaid, and tendered the same to the sheriff of Campbell county, who refused to accept the same, and notified him that he would proceed to sell. He immediately filed his bill setting forth the facts aforesaid, praying that Elizabeth McLarin, her attorney, and the said sheriff, might be enjoined from proceeding with said levy until the further order of the court.

The injunction was refused, and complainant excepted.

D. F. & W. R. HAMMOND, for plaintiff in error.

R. J. TUGGLE; T. W. LATHAM, by LESTER & THOMSON, for defendants.

MCCAY, Judge.

The general rule in this state is that men must be sued in the county of their residence. In case of joint obligors the constitution provides that they *may be tried* in the county of the residence of either obligor. The point made in the present case is that the original suit, whilst it was properly filed in Campbell county and properly served on Austell, yet the judgment taken against him alone was not properly and legally taken, because it was illegal at that time to take a judgment against Gorman. For some reason Gorman was not served by the first term; an order was, however, taken at that

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term to perfect service, and service had been perfected by the second term. It seems to have been taken for granted, and properly, that this was, as to Gorman, the first term, and that judgment could not be taken as to him. There being no appearance, a judgment was taken against Austell alone. We think the plaintiff had no right to the judgment against Austell. When sued out of his county and served in a proper case, he has a right to suppose that judgment will go against him according to law, and if he fails to appear, this, under our law, is all that can be done.

As this case stands it is precisely the same as to him as if he had been sued in Campbell county on his sole note. The only right to sue and try a case against Austell in Campbell county comes from the fact that he has given a joint note with Gorman who lives in that county. The plaintiff in taking a separate judgment against Austell has done so on the ground that the note is a several note. If it be treated as several, Campbell county has no jurisdiction, for the declaration alleges that Austell resides in Fulton county.

We are not prepared to say what right the plaintiff would have if Gorman had died pending the suit. But we are clear that as Gorman was living and a party to the suit, it was not the right of the plaintiff, at his option, to take a judgment against Austell alone. The law, in allowing a party thus to be sued, gives to the defendants certain rights against each other. If Austell pays *this* judgment he has no right to control it against Gorman. Had the law been followed he could have done so. If the paper were strictly a joint paper the suit and the judgment must be joint if both are alive; and it was only because it was joint that the right to force Austell to try his case in Campbell county existed. When the contract was treated by the plaintiff as a several contract the jurisdiction over Austell was gone. None of the cases referred to meet this. We recognize the right to perfect service, as was done; we recognize the right of a plaintiff who has a joint note to bring suit against both, and if one die to go on against the survivor. We admit, too, that if both the parties

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defendant live in the same county, and the note be joint and several, the plaintiff may dismiss as to one and go on as to the other. But when they live in different counties we think a different rule must obtain. The plaintiff, by suing both together in the county of one, has elected to treat them as joint obligors, and he cannot repudiate that election of his own motion so as to keep jurisdiction over the defendant who is sued out of his county. For these reasons we think this judgment against Austell is illegal. He has a right to have a joint judgment. The parties have elected to treat it as a joint debt, and by doing so they have forced Austell to submit to be sued—to have his case tried out of his own county. He cannot repudiate the election and keep jurisdiction over Austell.

Judgment reversed.

SELMA, ROME AND DALTON RAILROAD COMPANY, plaintiff in error, *vs.* **MARY A. REDWINE**, administratrix, defendant in error.

1. The bill of exceptions or the motion for a new trial, should show that testimony which is claimed to be illegal was objected to by the complaining party. A mere statement to that effect in the brief of the evidence is not sufficient.
2. Where the witnesses state that the land taken by a railroad company is worth as land only \$6 00 or \$7 00 per acre, but in the form and for the purpose it is taken it is worth to the balance of the land from \$30 00 to \$50 00 per acre, the presumption is that the increased valuation is put upon it on account of the damages done to the balance of the land : and no other damages should be allowed than what are specially stated and proved as further and additional damages.
3. Where the witnesses give the value of the land appropriated by the road, on the basis above stated, the damages cannot be increased by general statements that the value of the land as taken, with the incidental advantages and disadvantages done to the land by the road, make a sum greater than what the value of the land thus estimated amounts to.
4. The special damage suffered by the plaintiff's orchard may be allowed as proven.

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5. Interest in such cases cannot be given except as part of the damages, and then only from the time when the damages occurred.
6. Under the authority given by statute to this court, it is directed that a new trial be granted, unless the defendant in error will write from the verdict and judgment the sum of \$220 00, and upon the same being done the judgment shall stand affirmed.

Railroads. Eminent domain. Damages. Interest. Practice in the Supreme Court. Before Judge HARVEY. Whitfield Superior Court. April Term, 1873.

This case arose upon proceedings instituted by the Selma, Rome and Dalton Railroad Company, under its charter, to assess the land of Mary A. Redwine, as administratrix of William Redwine, deceased, appropriated by said company for its right of way, and also the damages sustained by her from such appropriation. A jury of seven freeholders was selected for the purpose aforesaid, and found for said Mary A. \$680 00. From this verdict the company appealed to the superior court. Upon the trial of the issue thus formed the evidence made substantially the following case :

The land in controversy is a portion of lot two hundred and ten in the thirteenth district and third section of Whitfield county. The railroad runs nearly straight through the lot, and for two-thirds of the distance, parallel to the dirt road leading from Dalton to Sugar Valley. The land is good for the section ; what is usually termed valley land. The dirt road is between appellee's house and the railroad. The fifty feet taken for right of way extends across the dirt road to within a few feet of the door-steps of her house. The bulk of her land lies beyond the railroad from her house. The embankment near the culvert, towards the north line of the lot, is three or four feet high. The course of the branch has been turned. The land on the east of the railroad, on the same side with the house, is uncultivated. It is tolerably well-timbered woodland. There is considerable inconvenience in turning out and managing stock on account of the railroad. There is a culvert towards the south side of the lot, which permits the water from a wet-weather stream to

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pass under the railroad. It is too small for the purpose intended. When the water is high it backs up the stream, overflows it, and cuts across the orchard, injuring it to the amount of about \$100 00. There has been considerable washing from this cause. Some of the trees in the orchard have died. The land taken is a strip one hundred feet in width, running through the entire lot, embracing about six acres. In addition to this, one acre was ruined by the washing. The railroad was partly graded in the year 1859. The appellee's intestate purchased the land in 1860 or 1861. The track was completed and the cars commenced running in the fall of 1870.

The witnesses for the appellee value the land in itself at from \$7 00 to \$10 per acre, but taking into consideration the damage done by the washing of the other land, injury to the orchard, and incidental damage, at \$680 00, the amount awarded by the first jury. These witnesses also testify that the land as taken is worth from \$30 00 to \$50 00 per acre.

The witnesses for the appellant value the land in itself at from \$3 00 to \$6 00 per acre. Taking into consideration the shape in which it is taken, they variously estimate it at from \$10 00 to \$20 00 per acre.

The appellant requested the court to charge the jury as follows: "No interest on any demand can be recovered beyond the time such demand would be barred by the statute of limitations, four years in this case, as it is in the nature of an account. The value of the land is sought in this case, and no interest can be estimated to increase the damages until appellant gets the land, at least, no interest, barred by the statute of limitations, can be estimated."

The court refused to charge as requested, but instructed the jury, on the subject of interest, as follows: "Interest can be estimated from the time the damages ought to have been paid to Redwine, by way of increasing damages."

The jury found for the appellee \$680 00. The appellant moved for a new trial because the verdict was contrary to evidence, and because the court erred in refusing to charge as

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requested, and in charging as above set forth. The motion was overruled, and appellant excepted.

The brief of testimony recites that certain evidence therein embraced was objected to on the part of the appellant, but neither the motion for a new trial nor the bill of exceptions contains any complaint of the ruling upon this point.

PRINTUP & FOUCHE; J. E. SHUMATE, by brief, for plaintiff in error.

JOHNSON & McCAMY, for defendant.

TRIPPE, Judge.

1. In the argument of this case it was urged that certain testimony was illegally admitted. The reply was made that the record did not show that objection was made to its admission, or that any exception was founded thereon, either in the bill of exceptions or in the motion for a new trial. And this is true. There is no reference to such a point, except that in the brief of the evidence there is a statement to that effect. This is not sufficient. The proper way to have raised the question was to have made the admission of the testimony claimed to be illegal a ground in the motion for a new trial, and to have verified it by the sanction of the judge, or to have set it forth in the bill of exceptions as one of the errors complained of. The bill of exceptions purports to set out specially every ruling of the court which was excepted to, and these are but recitals of the various grounds taken in the motion for a new trial. They cannot be enlarged by mere reference to a note made by counsel for plaintiff in error, in the brief of the testimony, although such a statement was in the brief when it was filed and when the motion was heard.

2. But from the judgment we render the point is of no practical importance in this case, as we hold that for another reason the verdict, so far as it could have been affected by the testimony which is claimed to have been objected to, shall be corrected or a new trial had. The witnesses for the defendant

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in error gave the real value of the land taken by the railroad at \$6 00 or \$7 00 per acre, but in the form and for the purpose it was taken, they state it is worth to the balance of the land from \$30 00 to \$50 00 per acre. Most of them say that it is worth as land only the comparatively small figures above stated, but they put the value expressed by the other figures upon it because it is taken out of the land in such a shape and for the purpose of using it for a railroad. These statements of the increased valuation are made in connection with others, showing the disadvantages which the balance of the land—the plantation, and the dwelling house, etc.—suffers by reason of the railroad running through the lot. This furnishes a very strong presumption that the raising the value from \$7 00 to \$50 00 per acre, was on account of the whole damage resulting to the lot of land by running the road through it, and no other damage should have been allowed except what were specially stated and proved as further and additional damages.

3. We are satisfied that the value of the land appropriated by the road was founded on the basis above stated, and the damages should not have been increased by the opinion of the witnesses that the value of the land as taken, with the incidental advantages and disadvantages to the land by the road, make a sum greater than the proven estimates furnished by the same witnesses would amount to. It was these opinions of the witnesses which it is stated in the brief of the testimony were objected to. Whether the exception to the evidence was or was not properly shown, we do not think the testimony was sufficient, when considered in connection with the balance of it, to have authorized the jury to have gone beyond what is above indicated as the true rule to have been adopted for ascertaining the damages. As will be presently seen we have directed this excess in the verdict to be remitted, or that a new trial be granted.

4. There was testimony that the orchard on the land was specially damaged \$100 00, and it was proper to allow for this. The road was located and partly graded in 1859. The

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intestate of defendant in error purchased the land in 1860 or 1861. Nothing further was done on the road until about 1870; the road was completed and the cars commenced running in the fall of that year. The writ for the assessment of damages was sued out in November, 1870.

5. Under this state of facts interest could not have been given for a period further back than the year 1870, which would make it about three years to the trial. If these seven acres be taken as the quantity of land used by the railroad, including the acre ruined by the water from an insufficient culvert, and \$50 00 per acre be counted as the average proven value, estimated in connection with the general damage to the land, and \$100 00 be added for the injury to the orchard, all this, with interest, will make about the sum of \$460 00.

6. As the jury found a verdict for \$680 00 it is directed that a new trial be granted, unless the defendant in error do write from the verdict and judgment the sum of \$220 00, and upon the same being done the judgment for the balance shall stand affirmed.

JOHN F. WILLIS, plaintiff in error, *vs.* R. H. POWELL, defendant in error.

Where the answer of the sheriff to a rule is evasive, the discretion of the court below in making the same absolute will not be interfered with.

Sheriff. Rule against officer. Before Judge KIDDOO. Early Superior Court. April Term, 1873.

The facts of this case are omitted for the reason that they would not tend to illustrate any principle enunciated in the decision. The answer of the sheriff was voluminous, and of such a character that it might well have been held evasive by the court below without doing any violence to its discretion.

FLEMMING & RUTHERFORD, by JACKSON & CLARKE, for plaintiff in error.

Ragland *et ux.* vs. Moore, Trimble & Company.

R. H. POWELL; A. HOOD, for defendant.

WARNER, Chief Justice.

This was a rule against the sheriff, calling upon him to show cause why he should not be attached for contempt for failure to make the money due on a mortgage *fi. fa.* placed in his hands. The sheriff filed his answer to the rule, and the court, after considering the same, made the rule absolute, and ordered an attachment for contempt of court to be issued against the sheriff; whereupon, he excepted. When a sheriff is ruled for contempt of the process of the court, and files his answer, and the same is not denied, the rule shall be discharged, or made absolute according as the court may deem the answer sufficient or not: Code, 3954. The court may have deemed the answer of the sheriff evasive and insufficient, and for that reason made the rule absolute. We find nothing in this record that will authorize this court to control the discretion of the court below in making the rule absolute and ordering an attachment to issue against the sheriff.

Let the judgment of the court below be affirmed.

WILLIAM RAGLAND *et ux.*, plaintiffs in error, vs. MOORE,
TRIMBLE & COMPANY, defendants in error.

When a town lot was set apart as a homestead, under the act of 1868, and it was levied upon and sold under a judgment founded on a debt contracted prior to 1868, and the debtor gave notice to the sheriff that he claimed \$500 00 of the proceeds to be invested in a homestead for himself and family, under the provisions of the Code, and it appeared, on a rule to distribute the money, that there were unsatisfied judgments in the hands of the sheriff to the amount of \$2,500 00, and only \$750 00 money in court:

Held, that it was not necessary that the notice to the sheriff should be given before the sale, and that there was sufficient evidence, *prima facie*, of the insolvency of the debtor to require that the \$500 00 claimed should, under the direction of the court, be invested in a homestead or the debtor and his family, as provided by section 2044 of the Code.

Homestead. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1873.

Moore, Trimble & Company ruled the sheriff of Talbot county, requiring him to show cause why he did not pay over to executions in their favor a fund realized from the sale of the property of William Ragland. Amongst other reasons why he has not paid over \$750 00, the balance in his hands after deducting costs etc., the sheriff sets up that he has been served with a notice that the defendant, William Ragland, and his wife, claim \$500 00 of said sum to be invested in a home for their benefit; that the property sold was in a town, and exceeded in value \$500 00, and could not be so divided as to give to them that amount. The answer also set forth other unsatisfied judgments against William Ragland, amounting to about \$2,500 00.

Upon the filing of the answer of the sheriff, William Ragland and his wife petitioned that \$500 00 of the amount in the hands of the sheriff be invested by order of the court in a home for their family.

The court refused the application because it did not appear that notice thereof had been given before the sale by the sheriff of the property, and because it did not appear but that there was sufficient other property belonging to Ragland, out of which the exemption could be made. To this decision the petitioners excepted.

WILLIS & WILLIS; M. H. BLANDFORD; MARION BE-THUNE, for plaintiffs in error.

E. H. WORRILL; J. M. MATTHEWS, for defendants.

McCAY, Judge.

Section 2044 of the Code, under which this application is made, does not require the notice to the officer to be before the sale. What is the object of the notice? Obviously to prevent the sheriff from paying out the money. The sale

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takes place independently of the notice, and will take place just the same whether the notice be given or not. The reason of the thing, therefore, would seem only to require the notice before the money is disposed of. The sheriff may pay it out to the plaintiff, or to other *fi. fas.* in hand, entitled to it. If he gets the notice he does this at his peril. That, as it seems to us, is the object of the notice. And if so, it is immaterial when the notice is given, if it be in fact given before the money is paid out. We incline to the opinion that this provision, giving the debtor the right to have \$500 00 set apart and invested, contemplates that he is insolvent, and that when such an application is made it ought to appear that such is the fact. But did not this appear, *prima facie?* Here were judgments four or five years old, to the amount of nearly \$2,500 00, unsatisfied, and they in controversy over the sum of \$750 00, the proceeds of the sale of a town lot that had been set apart as a homestead under the act of 1868. *Prima facie*, we think this made a case of insolvency. At least it cast the burden of showing that there was other property upon the parties resisting the application. It is plain to us that if there were such other property we would hear of rules against the sheriff for not making the money on the *fi. fas.* in his hands, and the simple fact that these judgments exist unsatisfied furnishes a fair inference that no such property exists.

Judgment reversed.

**FIELDING T. POWELL *et al.*, administrators, plaintiffs in error,
vs. THE MAYOR AND COUNCIL OF THE CITY OF ATLANTA,
defendant in error.**

There being evidence in this case to support the verdict, and the judge presiding having refused a new trial, we cannot say there was such abuse of his discretion as to call for the interference of this court.

New trial. Before Judge HOPKINS. Fulton Superior Court.
October Term, 1873.

Powell *et al.* vs. The Mayor and Council of Atlanta.

Powell and others, the administrators of Chapman Powell, deceased, brought case against the Mayor and Council of the city of Atlanta for \$1,500 00 damages, alleged to have been sustained on account of the construction by the defendant of certain defective sewers in said city, and its failure to repair the same, whereby plaintiffs' property was inundated, and a building in the course of erection, and the area wall enclosing the same, thrown down. The defendant pleaded the general issue. The evidence was, in substance, as follows:

Fielding T. Powell, sworn: Plaintiffs commenced the erection of a building on their land, situate in the triangle formed by Peachtree, Broad and Grubb streets, in the city of Atlanta. They had proceeded so far as to have completed the area stone wall of the cellar, and to have erected the interior brick wall to the height of about twelve feet. These walls were thrown down on most of the Grubb street line, say twenty-five or thirty feet, and part of the Broad street line, say four or five feet, by the flowing in of water upon said premises from said streets. Defendant had undertaken to build a sewer from a pond on the west side of Broad street to Grubb street, near to plaintiffs' building, and thence down Grubb street to Peachtree street, and thus to convey away the water accumulating on said streets. The earth on the portion of the streets referred to was all made earth, and therefore not as compact as if placed there by nature. When water flowed through said sewer, it being a dry sewer and not cemented, it fell through and permeated the made earth, and softened and undermined the plaintiffs' ground and building. This was demonstrated by experiment, for when the mouth of the sewer next to the pond was closed, no water appeared at plaintiffs' building, but when it was opened the contrary was the fact. There was also an old sewer several feet under the ground, that had been hidden from view by the elevation of Grubb street, across which it ran in the direction of plaintiffs' building. This old sewer was crossed near the surface by the new Grubb street sewer, and the new one, not being cemented, caused a larger volume of water to accumulate in said old sewer which ran in the

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direction of plaintiffs' Grubb street end-wall. Water also ran into this sewer from under an old building across Grubb street on the south side. This old sewer did not reach nearer than within two feet of plaintiffs' area stone wall, but the softness of the made earth, together with the force of the accumulated waters, caused the break upon plaintiffs' building at that point. The new sewer, by its defective construction, and this old sewer, by its condition, did the damage. Witness notified the city engineer, W. B. Bass, and M. Mahoney, the chairman of the street committee, of the danger to the building about one week before the accident or injury. They promised to remove the danger, and Bass did come there and do some little work, but it did not amount to much. Mahoney never came about the place until the day the walls fell. The sewers were taken up and well cemented by the defendant after the injury, and now the building is perfectly secure.

The evidence as to the amount of the damage to the plaintiffs is omitted as immaterial.

John Boutell, the architect and superintendent of the building, corroborated the evidence of Powell.

The defendant introduced William W. McAfee, who testified, substantially, as follows :

Built the new sewer, as a contractor, for defendant. It was a dry rock culvert such as defendant almost invariably builds. It was about two feet high by two and a half feet wide. Mr. Bass, the city engineer, gave him the dimensions for it. The work was well done. The culvert was sufficiently large for the purposes for which it was intended. It was the kind of culvert ordinarily built to carry away such a volume of water. The overflow on plaintiffs' lot was due to the following facts: This culvert ran along the outside of the side-walk where the excavation was made. The ground at this point was made earth, and in digging said excavation the loose earth was thrown between the culvert and the wall to fill up a place that had caved in when the hole was being dug. This loose earth became wet and sunk down behind and against the area wall and caused it to fall in. It would never have occurred

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had the loose dirt not been thrown between the wall and the culvert.

The old sewer ran across Grubb street, underneath the one built by witness, and emptied under some old buildings opposite to plaintiffs' lot. When plaintiffs cut it off in making their excavations the water could have backed up against the area wall, but whether it did this or not, witness cannot say. Did not cement the culvert, because it was not usual, and had no instructions to do so.

W. B. Bass, the city engineer, testified substantially as follows: Believes that most of the damage was caused by the accumulation of water in the old sewer from recent rains. His attention had been called by the plaintiffs to the threatened injury to the building some time before it occurred, and he made some efforts to remedy it by cutting a new ditch. There were various opinions as to the cause of the inundation.

M. Mahoney, sworn: Was chairman of the street committee during the year of the injury to plaintiff's property. Plaintiff, Powell, came to him on the day that the walls fell to have the danger removed. When they arrived at plaintiffs' lot the walls were in the act of falling; does not remember being notified at any other time of the threatened injury.

The jury found for the defendant. The plaintiffs moved for a new trial, because the verdict was contrary to the evidence. The motion was overruled, and plaintiffs excepted.

SIDNEY DELL, for plaintiffs in error.

W. T. NEWMAN, city attorney, for defendant.

TRIPPE, Judge.

Whilst we might have been better satisfied had the jury allowed damages to the plaintiffs in error, yet we cannot say that it is apparent the verdict was the result of passion, prejudice or other improper influence or motive, and that the judge who tried the case abused the discretion lodged in him by law in refusing to set it aside. Though there was strong

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evidence showing that the damage to plaintiffs' building was caused by defective sewers, the testimony of the city surveyor and the contractor for building sewers was to the contrary. With this conflict in the evidence, the jury had to pass on the case, and the presiding judge having refused to interfere, we do not feel constrained to set aside their action.

Judgment affirmed.

JOHN DOE, *ex dem.*, WILLIAM J. TINSLEY *et al.*, plaintiffs in error, *vs.* RICHARD ROE, *casual ejector*, and JOSEPH A. L. LEE, defendants in error.

1. A decree rendered against the defendant in a bill, with the word "executor" added to his name, without more, binds his personal goods and chattels.
2. The addition of the word "executor" to the defendant's name in the execution is a mere irregularity, which would not affect the purchaser's title.

Executors. Judicial sale. Execution. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1873.

The decree and execution under which the land in controversy was sold, were as follows:

"SILAS B. TINSLEY, LARKIN TINSLEY *et al.*, *vs.* THOMAS W. HOWELL, executor of WILLIAM TINSLEY, deceased."

Bill for Account and Injunction, in Chattahoochee Superior Court, November Term, 1856. Confession of judgment.

Whereupon, it is considered and decreed by the court that the complainants do recover of the defendant the sum of \$238 85, principal, and the sum of \$48 74, interest thereon up to the 27th day of November, 1856; and the sum of \$30 for costs, in this behalf paid out and expended, and for which execution may issue against said defendant.

"WILEY WILLIAMS,
Complainants' Solicitor."

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“GEORGIA, CHATTAHOOCHEE COUNTY.

“To all and singular the sheriffs of said State—greeting:

“We command you, of the goods and chattels, lands and tenements of Thomas W. Howell, executor of William Tinsley, deceased, you cause to be made the sum of \$238 85, principal, and the further sum of \$48 73 interest up to the 27th day of November, 1856, and cost, which (certain parties therein named) the next of kin and legatees of William Tinsley, deceased, lately in our superior court, recovered against said Howell, executor of William Tinsley, deceased, principal, interest and costs, and that you have the said several sums of money before the judge of our said court, on the fourth Monday in November next, to render to the plaintiff the principal, interest and costs aforesaid, and have you then and there this writ.

“Witness the Honorable James Kiddoo, judge of our said court, this 16th day of December, 1856.

(Signed) “NIMROD N. HOWARD, Clerk.”

The sheriff's deed, made in accordance with the sale under the above decree and execution, was in the usual form.

For the remaining facts, see the decision.

A. H. CHAPPELL; J. M. RUSSELL; L. T. DOWNING, for plaintiffs in error.

BLANDFORD & CRAWFORD; JOSEPH F. Pou, for defendants.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiff on the several demises of Adams *et al.*, against the defendants, to recover the possession of a certain described tract of land in the county of Muscogee, containing three hundred and twelve acres. On the trial of the case the plaintiff offered in evidence a deed to the premises in dispute from William J. Tinsley to Howell, dated 1st June, 1853, recorded 4th July,

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1853; also a deed from Howell to Adams, dated 30th August, 1858, and recorded 6th November, 1858, and proved that William J. Tinsley was in possession of the land for several years before and at the time he conveyed it to Howell, who remained in possession for a short time, and then went off, leaving Tinsley in possession as his tenant. The defendant offered in evidence a grant from the state to one Ovington, the drawer of lot number two hundred and sixty-one, dated 31st January, 1833; also, a deed made by William J. Tinsley to Lee, dated 16th February, 1856, the execution of which was proven by one of the subscribing witnesses thereto before Adams, as a justice of the peace, and recorded 11th July, 1857. The defendant offered in evidence a decree obtained in the superior court of Chattahoochee county, in favor of Silas R. Tinsley *et al.*, against Howell, executor of William Tinsley, deceased, in which it was ordered that an execution do issue against the defendant for the sum of money specified therein. This decree was obtained on the 27th of November, 1856. An execution was issued thereon against Howell, executor, and levied on the land in dispute, sold by the sheriff, and purchased by Lee, the sheriff executing to him a deed therefor, dated 8th of May, 1863. Lee was examined as a witness, and stated that Tinsley was in possession of the land when he purchased it from him, and thought he was the owner of it; that Adams, the plaintiff's lessor, knew that he went into the possession of it under his deed from Tinsley, and claimed it when he, Adams, purchased it from Howell. The jury, under the charge of the court, found a verdict for the defendant. A motion was made for a new trial on the several grounds specified therein, as contained in the record, which was overruled by the court, and the plaintiff excepted.

1. The real contest for the possession of the land is between Adams and Lee, and the question is, who, as between them, has the better title to it. Lee is in possession. Both parties claim to derive their title from William J. Tinsley. Howell purchased the land from Tinsley in July, 1853, and Adams purchased it from Howell in August, 1858. In Februa-

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ry, 1856, Lee purchased it from Tinsley, of which purchase Adams had notice at that time, and knew that Lee went into possession of the land under that purchase. Although there is evidence in the record that Tinsley, at the time Lee purchased the land from him, was in possession of it as the tenant of Howell, yet there is no evidence that Lee knew that fact, but on the contrary Lee states that when he purchased the land from Tinsley he thought he was the owner of it. But the land was subsequently levied on and sold as the property of Howell, under an execution issued on a judgment or decree of older date than Howell's deed to Adams, and Lee purchased the land at the sheriff's sale, to protect his possession under his purchase from Tinsley. But it is contended that inasmuch as the decree on which the execution issued was obtained against Howell, executor, Lee acquired no title to the land as Howell's property at the sheriff's sale. We think the decree against Howell, on which the execution issued, bound his individual property, on the statement of facts disclosed by the record. The addition of "executor" to his name, without more, did not prevent the decree from binding his personal goods and chattels.

2. The execution under which the land was sold by the sheriff, was not void, and the most that can be said of it is, that the word "executor" being added to the defendant's name was a mere irregularity, which would not affect the purchaser's title: Code, 2628. Although there may have been some abstract errors in the charge of the court to the jury, still, in view of the facts contained in the record, we will not disturb their verdict for the alleged errors in the charge of the court, as given, or in refusing to charge as requested.

Let the judgment of the court below be affirmed.

Central Female College vs. Persons.

CENTRAL FEMALE COLLEGE, plaintiff in error, vs. **ROMULUS C. PERSONS**, defendant in error.

(TRIPPE, J., having been of counsel, did not preside in this case.)

1. Where there was an action of ejectment with two demises, one from "The Central Female College," an incorporation, and the other from five persons as trustees of a church, and on the trial a deed was shown to the premises from the Central Female College to the said trustees, but it appeared that all of the trustees were dead at the commencement of the suit but three, and that the suit was brought without any authority from either of the three living:

Held, that the court was right in dismissing the suit.

2. Under the facts of the case, as they appear from the whole record, it was not error in the Judge to refuse to reinstate the case on the showing made. The title having passed out of the "Central Female College," the right to sue or to use the name of the College, is in the trustees of the church, and as to authority from the trustees of the church the whole subject was fairly before the court at the trial, and on the previous motion for continuance.

Ejectment. Trusts. Before Judge HALL. Monroe Superior Court. February Term, 1873.

The Central Female College brought ejectment against Romulus C. Persons for a lot of land situate in the village of Culloden, in the county of Monroe. The declaration was amended by adding a demise from James Smith, W. D. High-tower, Alfred Drake, Augustus F. Maddox and Littleton R. Vaughn, as trustees of the Methodist Protestant Church, at Culloden. The defendant pleaded title by prescription, and that there was in existence no such plaintiff as was set forth in the declaration.

The plaintiff introduced the following testimony:

- 1st. Deed covering the premises in dispute, from John Darley to the Central Female College, dated April 16th, 1852.
- 2d. Deed from the Central Female College to the aforesaid trustees of the Methodist Protestant Church, at Culloden, dated August 2d, 1856.

3d. C. S. LeSueuer testified in substance as follows: John Darley was in possession of the property in dispute at the

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time of the sale to the Central Female College. He had owned it for many years before that sale. The defendant went into possession some time in the year 1862. The Methodist Protestant Church at Culloden dissolved, or ceased to hold religious services in their house of worship in the year 1859. All the trustees are dead except three. He talked with the living trustees about bringing the suit before it was commenced, and they did not object. The places of those who had died had never been filled by the board. No meeting of the board had been held in many years. The Central Female College was a corporate body. The suit was brought to raise funds to pay the debts of the church. Whatever was left, after the payment of said debts, would go to the district conference of the Methodist Protestant Church. He had no authority from the trustees aforesaid for bringing the suit. It was "gotten up" by himself; did tell two of the surviving trustees that he had instituted suit, and they neither consented nor objected. The debts of the church are barred by the statute of limitations. The church owes witness and others.

The defendant moved for a non-suit. The motion was sustained, and plaintiff excepted.

The plaintiff then moved to amend his declaration by making the suit proceed for the use of the district conference of the Methodist Protestant Church. The motion was overruled, and plaintiff excepted.

The plaintiff, during the same term of the court, moved to reinstate the case. In support of such motion the affidavit of C. S. LeSueuer was presented, to the effect that on account of his deafness he was unable to understand the ground upon which the case was dismissed; that had he known it was on account of a want of authority to institute said suit he would have testified that he was a member of the board of trustees of the Central Female College, and was the agent of said board to procure lumber and have the church built, which is located on the premises in dispute. That he was also a trustee of the Methodist Protestant Church, at Culloden, and has neither resigned nor been removed from said trust.

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The affidavit proceeded to state other facts, all of which appeared in the testimony of the deponent.

In opposition to said motion, counsel for defendant stated that one year prior to the trial, the case had been continued at the instance of the defendant, on account of the absence of two of the trustees, who had been subpoenaed, by whom he expected to show, not only that they never authorized said suit but were opposed to it.

The motion was overruled, and plaintiff excepted.

A. M. SPEER; J. S. PINCKARD, for plaintiff in error.

A. D. HAMMOND, by PEEPLES & HOWELL, for defendant.

McCAY, Judge.

1. It is true that title was shown in the Central Female College, and that being an incorporated company, that demise in the declaration was sustained by the evidence. But the plaintiff had also shown a title out of the Central Female College, and it had, in fact, no right to the premises according to the evidence. Its grantee, it is true, had a right, under the usual practice in such actions, to sue and recover in its name. But who is its grantee? Plainly the trustees of the church. At last, therefore, authority from the trustees is necessary not only to sue in their name, but to use the name of their grantor for their benefit. As the case stood this was evidently done in this case without their authority.

2. Nor can we see anything in the motion made to reinstate. The true state of the case was distinctly brought to the minds of the plaintiff, or of the gentleman who is pressing this matter, in the motion to continue at the previous term, and he should have come to the trial term prepared to meet the defense then announced. The country, independently of the rights of the defendant, cannot spare its time to rehear cases, unless the party complaining is about to be hurt, without neglect or *laches* on his part. Surely that cannot be said here. Not only at the hearing, but at the previous term, the position

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and intention of the defendant was distinctly announced, and the complaining party and his counsel ought to have met the case as it was presented. The deafness of the defendant is not a good excuse. He ought not to have trusted to his hearing, knowing his infirmity, but told his counsel of his case as he claims it. Nor are we sure that, situated as he is towards the church, he would have a right to use the name of the other trustees without authority from them, even if while he was a member he was a trustee.

Judgment affirmed.

**THE WESTERN RAILROAD COMPANY, plaintiff in error, *vs.*
RICHARD YOUNG, administrator, defendant in error.**

1. If the conductor of a railroad train agree to put a passenger off at a particular place, which is not a station or regular stopping place, it would be the duty of the conductor to stop the train at that place, so that the passenger could get off in safety. This rule would apply although the passenger had a ticket only to the last station passed before reaching the place at which he was to be put off.
2. If the agreement with the conductor was that the train would not be stopped, but its speed only slackened, it was not error in the court to charge the jury that the speed of the train should be so checked that the passenger could get off safely. Nor was it error to give such a charge as a qualification to a request of defendant, "that if the train did slack up so that plaintiff might have gotten off safely, then although plaintiff was injured in getting off, defendant is not liable in damages."
3. Under the facts of this case it was not error in the court to refuse to charge the jury "that if the train slackened up so that plaintiff might have gotten safely off, it was for plaintiff to determine whether he would get off or not; and if he did get off, and in so doing was injured, he is not entitled to recover."

Railroads. Conductor. Negligence. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1872.

Allen Andrews brought case against the Western Railroad Company for \$5,000 00 damages, alleged to have been sustained by him on account of the negligent running of its cars by the defendant. The general issue was pleaded.

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Plaintiff was introduced and testified substantially as follows: He had bought a ticket to the steam-mills station on said road; he was traveling with a friend. The cars did not stop at said point, and, upon inquiry, witness was told that the conductor would put them off at a crossing nearer the place to which he was going; when the cars approached the crossing witness was notified of the fact by his friend; they went to the rear of the cars; the train having slackened up, his friend got off; witness was standing on the bottom step on one foot, waiting for cars to stop, that he might get off; while in this position the whistle blew "off breaks," the car apparently jumped forward, jerking him off the steps, throwing his body suddenly around while his weight was on his foot, wrenching his right knee out of place, throwing him violently on the ground, greatly bruising his hip and side. He remained there until the evening train came along, and tried to get them to bring him back to Columbus, but the conductor refused to stop and take him on. He hired men to carry him, on a litter, back to the steam-mill; next morning was brought home, where he was confined to bed over two months; was attended by Dr. Billing, and paid him \$22 00 or \$23 00, to which was added medicine, \$3 00; was unable to transact any business until the middle of July; was a mechanic; received \$4 00 per day when he was well; could not get about very well now, nor bear his weight long at a time on that leg.

On cross-examination, stated he had never stepped off a train when in motion.

One Renfroe corroborated substantially what plaintiff had sworn; that he was a mechanic; that plaintiff's work was worth \$4 00 a day. Others testified plaintiff was worth \$3 00 to \$4 00 a day. Plaintiff was sixty or sixty-five years of age.

Defendant introduced one Hughes, who testified that he was conductor of the train on which plaintiff was passenger at the time he was injured. Plaintiff was with a white man, and both were going to look at land, at a point beyond steam-mills, a regular stopping place for trains on said road; before

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arriving at steam-mills the white man stated to witness that he and plaintiff wished to go to a point beyond steam-mills, and get off at a crossing, and asked witness to put them off there; witness replied, that as the train was behind time he could not stop, but would slack up at the crossing; plaintiff and white man had tickets only to steam-mills, and paid nothing for riding beyond steam-mills; they went on beyond steam-mills; as train neared crossing it slacked up, and witness went back through the cars to tell white man and plaintiff to get ready to get off; both had gone out of the car, and were standing on lowest step of the car, one on one side, and one on the other; the white man got off a few yards from the road; plaintiff, as soon as he saw white man off, attempted to get off himself, and in doing so fell and was injured. Plaintiff, in getting off, stepped in rather an opposite direction from that in which the train was moving; after plaintiff was off witness pulled bell-rope, and train went on; the train was moving at the rate of about one and a half miles an hour when plaintiff got off.

The court charged, "that if plaintiff had bought a ticket to steam-mills, and it was afterward agreed to put him off at the crossing, this was as if he had originally bought a ticket to the crossing; that it was the duty of defendant so to manage the cars that the plaintiff could get off in safety, even if they had to stop the train; and if defendant failed to slack up so that an old man could get off in safety, and in endeavoring to get off he was injured by the neglect of defendant, then defendant was liable to plaintiff for the injury from such neglect." To which charge defendant excepted.

Defendant requested the court to charge, "that if the defendant agreed to take plaintiff to steam-mills, and put him off there, but plaintiff requested conductor to take him to a point further on the road where there was no regular stopping place, and the conductor agreed to do so, but would only slack up, and not stop, then if the train did slack up so that plaintiff might have gotten off safely, then although plaintiff was injured in getting off, defendant is not liable in damages."

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The court refused the charge as presented, but qualified it by saying "that the train must slack up so that plaintiff could get off safely." Whereupon defendant excepted.

Defendant requested the court to charge "that if the train slacked up so that plaintiff might have gotten off safely, it was for the plaintiff to determine whether he would get off or not, and if he did get off, and in doing so was injured, he is not entitled to recover." The court refused to charge as requested, and defendant excepted.

The jury returned a verdict for the plaintiff for \$591 00.

Error is assigned upon each of the aforesaid grounds of exception.

Allen Andrews having died while the case was pending in the supreme court, his administrator, Richard Young, was made a party plaintiff in his stead.

PEABODY & BRANNON; J. F. Pou, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

TRIPPE, Judge.

1. The case of *The Georgia Railroad and Banking Company vs. McCurdy*, 45 Georgia, 288, we think, determines the first point made in the case. If the conductor of a railroad train agree to put a passenger off at a particular place, whether it be a regular station or stopping place or not, it would be the duty of the conductor so to stop the cars at that place that the passenger could get off in safety. It cannot affect the rule that the passenger had a ticket only to the station last passed, before reaching the place at which he was to be put off. The conductor had the power to demand and receive any additional fare accruing for carrying the passenger to a point beyond the station to which his ticket entitled him to be carried. And as was said in the case above referred to, "if he were to take fare for four miles he would be bound to put his passenger off there;" See 14 Howard's Reports, 468 ; 16 *Ibid.*, 260, 469 ; 3 Allen, 18.

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2. The chief contest in the argument was whether the court was right in using the word "could" in the charge instead of the word "might," as he was requested. The charge, in substance, was that the cars should have been stopped or "slacked up," so that the plaintiff "could get off in safety." The court was requested to charge that if the train did slack up so that plaintiff "might have gotten off safely, then, although plaintiff was injured in getting off, defendant is not liable." The court used the proper term. "Might" rather implies *was possible, within the limits of chance.* "Could" more strongly signifies *was able, had the power.* Certainly a conductor has not discharged his duty who so checks his speed that it is possible for a passenger to get off safely. But whether I am right or wrong in this criticism or explanation of these two potential mood prefixes which are often indiscriminately used, the difference between the two is hardly potential enough to constitute a legal error sufficient to set aside a verdict, reverse a judgment and grant a new trial.

3. The second request to charge made by defendant below is also obnoxious to the criticism already made on the word "might" in this connection. But it goes farther. It is "that if the train slacked up so that plaintiff might have gotten off safely, it was for him to determine whether he would get off or not, and if he did get off, and in so doing was injured, he is not entitled to recover." The conductor was standing close by, he saw plaintiff and the friend he was traveling with standing on the steps of the car ready to get off. That friend did get off. The cars were still in motion and did not stop. The conductor neither gave warning not to get off, or notice that the cars would stop or still further slack up. In fact he knew the cars would not stop. The passenger took the only chance he had. He tried to follow his friend, the conductor standing by. All this makes a case as strong as that of *The Georgia Railroad vs. McCurdy, supra*, and we do not see anything that calls for a reversal of the judgment of the court below.

Judgment affirmed.

Tritt vs. Bize.

JAMES TRITT, plaintiff in error, *vs.* DANIEL R. BIZE, defendant in error.

The superior court has jurisdiction of an action brought for the breach of an indenture of apprenticeship executed under the provisions of the act of 1865-6.

Apprentice. Jurisdiction. Master and servant. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

For the facts of this case, see the decision.

HENRY L. BENNING; CHARLES R. RUSSELL, by JAMES M. RUSSELL, for plaintiff in error.

PEABODY & BRANNON, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on an indenture of apprenticeship executed by the parties thereto, on the 8th day of December, 1868, under the provisions of the acts of 1865-6, alleging a breach thereof on the part of the defendant. At the trial the defendant demurred to the plaintiff's declaration, which demurrer was sustained by the court, and the plaintiff's action dismissed: whereupon the plaintiff excepted. It was insisted on the argument here, that the superior court had no jurisdiction over the subject matter of the suit, but that the ordinary of the county had the exclusive jurisdiction over it, under the provisions of the acts before mentioned, as embraced in the Code: see Code, sections 1871 to 1884, inclusive. This action is a civil case, and the superior courts, under the constitution, have jurisdiction in all civil cases except as otherwise provided therein. This case is not within any exception made by the constitution. There can be no doubt, we think, that prior to the acts of 1865-6, the superior courts in this state had jurisdiction of the subject matter of this suit. Is that

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jurisdiction taken away by these acts, or either of them? There are no *negative* words in either of those acts which would deprive the superior courts of jurisdiction. It is true the ordinary may, in all controversies between the master and his apprentice, during the existence of that relation, exercise jurisdiction upon the complaint of either party upon notice, and cause justice to be done in a summary manner, but that merely affords a cumulative remedy, which did not exist under the old law, and the same may be said of other provisions in the acts of 1865-6. The old law which gave the superior courts jurisdiction, and the acts of 1865-6, may stand together and have concurrent efficacy; the latter does not repeal the former so as to deprive the superior courts of jurisdiction. There are no words in either of those acts which declare that the remedy of the apprentice for a breach of the indenture of apprenticeship on the part of the master, shall be conferred on the ordinary alone, and *not elsewhere*: therefore the ordinary may exercise jurisdiction as provided in those acts without interfering with the general jurisdiction of the superior court on the same subject matter, in a suit brought on the indenture of apprenticeship, alleging a breach thereof. In our judgment, the court below erred in sustaining the demurrer to the plaintiff's declaration and dismissing the same.

Let the judgment of the court below be reversed.

GEORGE SIMS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. It is not a good ground to quash an indictment that, in organizing the grand jury which found it, the judge discharged from the traverse jury a juryman summoned and sworn thereon, and placed him upon the grand jury for the term, and that he was chosen foreman thereof.
2. It is not a good ground to quash an indictment that it was found at an adjourned term of the superior court.

Criminal law. Indictment. Jury. Adjourned term. Before Judge HALL. Newton Superior Court. September Adjourned Term, 1873.

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George Sims was placed on trial for the offense of rape. He moved to quash the indictment upon the following grounds:

1st. Because John T. Henderson, the foreman of the grand jury which returned the bill, was an illegal juror, as the *tenire* showed that he was regularly drawn as a traverse juror and not as a grand juror.

To this ground the presiding judge attached the following note :

"It was stated on the argument of the motion to quash the indictment, by the court, and admitted to be true by counsel for Sims, that on the second Monday in September the grand jury was reduced below eighteen in number, and tales jurors were selected to fill up the panel. The grand jury was composed mainly of inexperienced men, and the sheriff was instructed to get three or four men of experience. He did so, and among the jurors summoned as talesmen was John T. Henderson. He was reported to the court as being on the special or traverse jury. He was discharged as a special or traverse juror, and was sworn as a grand juror."

2d. Because the indictment was returned at an adjourned term of the court.

The motion was overruled, and the defendant excepted.

The trial proceeded and resulted in a verdict of guilty. Error is assigned upon the above exceptions.

J. M. PACE; L. B. ANDERSON, by brief, for plaintiff in error.

T. B. CABANISS, solicitor general, by PEEPLES & HOWELL, for the state.

McCAY, Judge.

1. As we understand the facts—they are not very distinctly stated in the record—the judge, on the first day of the term at which the bill against the defendant was found, in organizing the grand jury for the general duties of the term, discharged a juror from the traverse jury and had him sworn in

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as a grand juryman. This fact was specially pleaded on arraignment as a reason for quashing the indictment. We think the grand jury was not illegal, and the judge was right in sustaining a demurrer to the plea. Under our old law, when a class of men were separated from their fellow-citizens and fellow jurors, and set aside as grand jurors in consequence of their peculiar fitness for the duty, there might be something in such an objection, and there are expressions in some of the earlier cases before this court sustaining such a view as that a grand juryman is not a legal "bystander" to sit on a petit jury in a criminal case; that he is not a peer of the prisoner. But the constitution of 1868, and we think wisely, breaks up that distinction. All jurors are now required to be upright and intelligent men, and it is distinctly provided that there shall be no distinction in the classes of men selected for service on the grand and petit juries. They are now all drawn from the same box: Act of 1869. If anybody can complain it is the juryman himself, as he may prefer to serve as he was drawn to serve. The management of the details of the business of the court must be in the discretion of the court, and his discretion ought not to be interfered with unless abused. In this case it seems that the juryman was an experienced man, and the judge thought he could do better service on the grand than on the petit jury, a matter, too, in which the grand jury agreed with the judge, as they made him foreman. We do not think the jury was for this reason illegal.

2. It would be sticking very closely in the bark to give this act authorizing adjourned terms (Code, section 3245,) the narrow construction contended for. The language of the Code is that the judge may, in his discretion, hold adjourned terms when the business requires it, to close the dockets. Our opinion is, that the words "to close the dockets" does not and was not intended to limit the business done, as that no more business should go on the dockets, but that the authority was given to the judge to hold adjourned terms when it is necessary to close the dockets. This is the motive that is to operate in the discretion of the courts in holding the adjourned

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term. Such has always been the construction of this authority, and we think rightly. The adjourned term is merely the continuance of the regular term, and the court, when thus in session, has the full power and jurisdiction of the superior court.

Judgment affirmed.

CHARLES H. JOHNSON, plaintiff in error, *vs.* CHARLES W. BROWN *et al.*, defendants in error.

A letter of credit guaranteeing the payment of what the party in whose favor it is drawn may purchase from any dealer in a certain city, cannot be altered without the drawer's consent, so that it will bind them for what may be purchased of dealers in another and different city.

Guaranty. Alteration. Before Judge HALL. Pike Superior Court. April Adjourned Term, 1873.

Charles H. Johnson brought assumpsit against Charles W. Brown and James C. Hightower, on the following instrument:

“BARNESVILLE, December 31st, 1860.

“*To whom it may concern:* This is to certify that we believe J. W. Owen and H. F. Owen, who are desirous of buying some stock in the carriage and wagon line, good for what they may buy, to the amount of \$600 00; and any person living in Griffin, Georgia, who may feel disposed to sell them, will please do so on as long time and as low price as possible, and should they not pay on its becoming due, we do hereby promise to see it paid.

(Signed)

“C. W. BROWN,
“JAMES C. HIGHTOWER.”

The declaration alleged that on the faith of said letter of credit, the plaintiff, on January 14th, 1861, at the city of Griffin, sold to said J. W. and H. F. Owen, under the firm name of Owen & Brother, goods to the amount of \$201 25,

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taking their promissory note therefor, payable sixty days after the date thereof; that said Owen & Brother failed to meet said note at maturity, whereupon said defendants became liable as guarantors, etc.

The defendants pleaded the general issue, *non est factum*, and that they did not sign the paper sued on as it now appears, but that said paper was originally addressed to any person in the city of Macon, and the same was afterwards changed to Griffin, by some party, without the knowledge or the consent of the defendants, which alteration relieved them of all liability thereon.

The evidence is unnecessary to an understanding of the decision, and is therefore omitted.

The court charged the jury, among other things, "that if they believed from the evidence that in the letter of credit signed by the defendants, the word 'Macon' was originally written, and the same was afterwards, without the knowledge and consent of the defendants, erased, and the word 'Griffin' substituted in place of Macon, then this is a material alteration of the letter, and you should find for the defendants."

The jury found for the defendants. The plaintiff moved for a new trial because of error in the aforesaid charge. The motion was overruled, and plaintiff excepted.

SPEER & STEWART, for plaintiff in error.

J. A. HUNT ; S. C. McDANIEL, for defendants.

TRIPPE, Judge.

The reply made by plaintiff in error to the plea and evidence of defendants is, that the alteration is immaterial, that it could not be a matter of interest to them that credit should have been given on the faith of their letter in Griffin instead of in Macon. We think that both on principle and authority the alteration of the letter vitiated it. First, the writers of the letter may have had many reasons to prefer the credit being given in Macon. It may have been the headquarters



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of their own moneyed transactions. Their own consignments or deposits may have been there. It might have been easier for them to have made payments in Macon than elsewhere, to have procured accommodations so as to meet whatever liabilities might fall upon them on account of the letter, and generally to have run less risk of affecting their own credit, by giving a guaranty which was to be met at Macon. And, further, they had a right to limit the market where their own character for responsibility, etc., was to be tested—for instance, to a place where they might have been known—rather than where inquiry would be provoked by comparative non-acquaintance. Be the cause what it may have been, they had a right to indulge their own preference in fixing a very reasonable condition to their guaranty, whether outsiders could appreciate it or not. In Bleeker *vs.* Hyde, 3 McLean, 279, it was held that “a letter of credit to a particular firm, and which guarantees them payment, will not bind the guarantor if the purchase be made of other persons.” In this case the writer of the letter was held to be bound, but it was from the fact that after the purchase was made he saw and approved of the invoices, and also that he took part of the goods into his possession on the ground that he was bound to pay for them. The principle was distinctly recognized as given in the quotation made. So in Grant *vs.* Naylor, 4 Cranch, 224, it was held that a letter of credit addressed to John and Joseph Naylor, and delivered to John and Jeremiah Naylor, will not support an action by the latter for goods furnished by them to the bearer upon the faith of the letter of credit, and this, too, although the letter was wrongly addressed by mistake. The decision goes pretty far in reference to the question of mistake, and whether that was right or wrong, the case is undoubtedly authority on the point for which it is referred to. There was no evidence in either of these cases showing that the drawer of the letter was injured, or would in any wise be injured on account of the matter pleaded. They were put on the ground that a surety is not bound beyond the scope of his engagement: 10 John., 179; 4 *Ibid.*, 475; 16 *Ibid.*, 99. The same

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doctrine is recognized in the elementary authorities as decided in the cases from Cranch and McLean. If this be so, as to who may be parties plaintiff, or who may become creditors on such letters addressed to particular persons, why is it not equally applicable to letters drawn on particular places? The principle is the same.

Judgment affirmed.

DANIEL F. GUNN, plaintiff in error, *vs.* **WILLIAM H. CALHOUN**, defendant in error.

Where exception was taken to the judgment of the chancellor enforcing a decree of the court by attachment for contempt, and neither the record nor the bill of exceptions sets forth said decree, the judgment of the court below will be affirmed.

Practice in the Supreme Court. Equity. Bill of exceptions. Decree. Attachment. Before Judge HILL. Houston Superior Court. May Adjourned Term, 1873.

For the facts of this case, see the decision.

WARREN & GRICE, for plaintiff in error.

DUNCAN & MILLER; S. HALL, for defendant.

WARNER, Chief Justice.

This was a rule issued by the court, calling upon the defendant to show cause why he should not be attached for contempt in refusing to perform a decree rendered against him in an equity cause. The defendant filed his answer in writing but not under oath. There was nothing in the defendant's answer of which the court could take judicial notice. The decree sought to be enforced is not in the record before us, and we cannot know whether the court below erred or not in ordering an attachment to be issued against the defendant for contempt in failing to perform it. The legal presumption

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is in favor of the action of the court until the contrary is made to appear. If the decree in the equity cause did not authorize the court to enforce it by attachment, as set forth in the record, it was incumbent on the plaintiff in error, who complains of the judgment, to show that fact by the production of the decree, which has not been done in this case.

Let the judgment of the court below be affirmed.

Kit Brown, plaintiff in error, *vs.* THE STATE OF GEORGIA,
defendant in error.

1. It is not error, on a trial for murder, for the court to allow evidence of a difficulty between the parties three weeks before. It bears upon the great question in every such case, to-wit: whether the killing was done with malice or not.
2. When a motion was made for a new trial, on the ground that a witness (whose affidavit was produced) would testify to certain threats made by deceased against the prisoner, and which the witness had communicated to the prisoner before the encounter in which the killing occurred, and the movant stated on oath that said facts and their importance did not occur to him at the trial, and that he had not informed his counsel of them, he being an ignorant man and knowing nothing of his rights:

Held, that as it appeared on the trial that the prisoner and deceased had each made threats the one to kill the other, and as the evidence now relied on was only cumulative, and could at least only strengthen a line of defense, insisted on at the trial, it was not error in the judge to refuse the new trial, as the reason for the neglect to introduce it at the trial was unusual and open to suspicion.

3. The verdict in this case is justified by the evidence.

Criminal law. Evidence. New trial. Newly discovered evidence. Before Judge BUCHANAN. Monroe Superior Court. August Term, 1873.

Kit Brown was placed on trial for the offense of murder, alleged to have been committed upon the person of one Lindsey Johnson, on June 29th, 1873. The defendant pleaded not guilty. The evidence for the state made, in substance, the following case:

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On the day specified in the indictment, the defendant was at the Sunday-school ground, near the Ocmulgee river, in Monroe county. He was heard to say that he did not come there to get a lesson, but to kill a negro, or to get killed. When the deceased started from the school-ground, some twenty persons surrounded him, for the purpose of preventing the defendant from killing him. The defendant went towards the crowd in which deceased was. As he approached he drew his knife. He ran into the crowd three times, with his knife in his hand, but was pushed off. Deceased asked him what he wanted. He replied, "Damn it, did I say I wanted anything?" Deceased then ran back and drew his pistol. Defendant picked up a rock, and as he did so deceased fired at him. The deceased again started home, and defendant went home. Between a quarter and a half a mile from where this difficulty occurred, defendant was seen coming back towards deceased. When he approached sufficiently near, he raised his gun and pointed it at deceased. Deceased drew his pistol and fired. Defendant ran up a little nearer, again raised his gun and pointed it at deceased, when the latter fired a second time. The defendant then ran still closer to deceased and fired, wounding him so severely as to cause his death. Defendant immediately decamped. Levi and Parker Brown were with the defendant. Levi is his brother. All had knives in their hands.

A witness for the state, by the name of Thomas Dumas, testified, substantially, as follows, over the objection of the defendant:

One Saturday evening, about three weeks before the homicide, we were all in the road playing marbles. The defendant said "you are all hallooing here now, and the first thing you know I will throw a marble down some of your damned throats." Deceased said, "you need not talk that way, Kit Brown, there are some others here besides you." The defendant ran up to deceased with his knife open and two rocks in his hand, and dared him to speak, threatening to cut his throat from ear to ear. Deceased remained silent. After that deceased

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walked off and said, "Kit Brown, 'taint worth while for you to be rearing and cursing in that way; I am not afraid of you." Whereupon the defendant ran up to him, placed his hand on his throat, and said, "did not I tell you to hush? No damned negro can talk back to me when I talk." Deceased stepped back and said, "get away, Kit Brown, I don't want any fuss with you." Witness told deceased to hush. Defendant said, "I am going home to get my pistol. I will see who is against me and who is not." The defendant said, as he walked off, "by G—d, I am not afraid of you damned negroes. By G—d, I ruled Jasper county, and damned if I don't rule Monroe."

The evidence for the defense tended to show that the defendant was the aggressor in the school-ground difficulty. That at the time the defendant was approaching deceased, when the homicide was perpetrated, a man by the name of Anthony Hammond begged him to desist; that he agreed to cease provided deceased would also stop, and as a move in that direction, lowered his gun, resting the butt on the ground; that Hammond then approached deceased and his party, saying, "peace is made here, gentlemen," several times. That some one said, "damn the peace," and a shot was fired, the bullet striking the ground near Hammond's feet. That a second shot was then fired, after which the defendant fired at deceased. That numerous threats had been made by deceased to kill defendant, all of which had been communicated to him prior to the homicide.

The jury found the defendant guilty. He moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in admitting the evidence of Thomas Dumas, as to the difficulty some three weeks before the homicide.

2d Because the verdict was contrary to the testimony.

3d. Because the defendant has discovered since the trial of said cause, that he can prove by one Bill Watson that on the night previous to the day on which deceased was killed, he saw him moulding bullets, which he (deceased) said he was

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moulding for the purpose of killing the defendant; that deceased told him that he was going to kill the defendant on the next day, and that he (Watson) must tell the defendant to come down there, and that he was going to kill him, but not to tell him that he (deceased) had a pistol. That said Bill Watson, on the morning of the day on which deceased was killed, told the defendant of all that the deceased had said. That this evidence did not occur to him at the time of the trial; that he knew nothing of its effect and consequently did not communicate it to his counsel. That he was an ignorant colored man.

This last ground was supported by the affidavits of Bill Watson, of defendant and of his counsel.

A new trial was refused and defendant excepted.

J. A. HUNT; E. B. AMOS, by A. M. SPEER, for plaintiff in error.

T. B. CABANISS, solicitor general, by PEEPLES & HOWELL, for the state.

McCAY, Judge.

1. The relations between the prisoner and deceased, whether they were friends or enemies, would seem in almost every homicide to be material. That they had a difficulty three weeks before certainly tends to elucidate the question of malice. True, they may have made friends, but, *prima facie*, we think it furnishes evidence going to show the state of mind at the killing. The normal condition of men's relations to each other, at least in society, is doubtless that of friendship. But if that relation be shown to have been interrupted, we think it not unfair to presume, *prima facie*, that the interruption continues. We think, therefore, there was no error in allowing this testimony to go before the jury.

2. The other point in this case, to-wit: the ground of new trial, based upon the fact that proof can be made that the deceased had threatened to kill the prisoner, and that this threat

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had come to his ears, presents a new question. It is not pretended that this is newly discovered evidence, as it is plainly, in the very nature of it, evidence that the prisoner must have known of at the trial. The ground assumed is, that the prisoner is a very ignorant man, and did not know of its importance; that he did not inform his counsel of it for this reason. We are not prepared to say that a case might not exist where such an excuse as this for not using testimony might not be sufficient. There are extreme cases of ignorance where the principles of justice and equity might make it the duty of the court to push its liberality and charity to a great extent. But the opportunities for trifling with the courts by such legal *laches* as this is so great, that the case presented should not only present a very clear case of want of consideration and ignorance, but the evidence should be of paramount importance. Neither of those things appear here. The prisoner seems to have fully understood that it was important to show the relations between him and the deceased, and upon this very point, of threats by deceased, they had distinct evidence before the jury. We are incredulous, under the circumstances, of his want of knowledge of the value of the testimony. Besides, we think it not of such great importance as is insisted on. At best it is only cumulative. As we have said, evidence upon this very point was produced, and it is doubtless true, and was so thought by the jury, that there had been mutual threats, of which both parties had heard.

3. Nor do we think the new evidence would at all justify or excuse the prisoner. The evidence presents a bad case of recklessness, violence and anxiety to take the life of deceased, and the facts present no such circumstances as would make the new evidence of the deceased's threats and the knowledge of them by the prisoner, of any very striking significance.

Judgment affirmed.

SPENCER E. EASON *et al.*, plaintiffs in error, *vs.* SAULSBURY,
RESPESS & COMPANY, defendants in error.

1. When a factor holds two claims on his debtor, and has received cotton consigned to him on account of said claims, which he sold for an amount sufficient to discharge what is legally due on both, and no application of the money has been made to either of the claims, the jury may, on the trial of a suit on one of the debts, where payment is pleaded, apply enough of the amount so received by the creditor to discharge the debt on which the suit is founded.
2. The debtor may prove what is legally due and collectible on both debts on account of usury, in order to show that the creditor has received a sufficient amount to discharge both.
3. If it appear in evidence that separate actions are pending on both claims, and an issue be made by plea and proof as to the amount due on the debt involved in the case on trial, the jury should, even if the verdict be for the defendant, state the amount they find due on the debt, so that on the trial of the other the record may show how much of what was received by the creditor has been applied to its payment.

Appropriation of payments. Usury. Verdict. Before Judge KIDDOO. Schley Superior Court. April Term, 1873.

Saulsbury, Respess & Company brought complaint against Spencer E. Eason, as drawer, and E. D. Eason and J. S. Eason, as indorsers, on a draft, embracing within it a crop lien, dated March 31st, 1871, payable seven months after date, for \$233 60, besides counsel fees, and addressed to plaintiffs. The defendants pleaded the general issue, usury and payment. The evidence presented the following case :

The instrument sued on was given for \$200 00, borrowed by the drawer from the plaintiffs; the legal interest for the time the said sum was loaned would have been \$8 12, making the whole amount \$208 12; the \$25 00 in excess of that sum is usury. The drawer had shipped to the plaintiffs ten bales of cotton which they had sold for him, retaining the proceeds. He produced a statement from the plaintiffs showing that eight bales brought \$589 00 net, and the other two bales \$170 90 net. On the 23d of February, 1871, he borrowed from the plaintiffs \$500 00 on a similar instrument, payable eight months after date. The draft covering this last advance

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was made for the sum of \$675 00. He had not appropriated the money realized from the sale of said cotton to the payment of any particular debt, nor had he received any notice of any appropriation by the plaintiffs. Suit had been commenced on the draft for \$675 00, to which the pleas of the general issue, usury and payment had also been filed. The counsel fees were shown to be worth ten per cent.

The jury found for the plaintiffs \$132 00 principal, \$13 20 interest, as counsel fees and costs of suit. The defendants moved for a new trial upon the following grounds:

1st. Because the court erred in charging the jury as follows : "A defendant may also set off to a debt, usury that he has paid on another contract between the same parties, but before he can do this he must plead it as an off-set, that he has paid it, the amount of usury, etc., and must prove that he has actually paid it on that other contract. He would not be entitled to reduce the contract sued on by showing that he had agreed to pay usury on another which is not paid, but would have to plead it to that other when sued."

2d. Because the court erred in charging as follows : "If neither debtor nor creditor has applied the payment in this case, if any, you can do so to whichever seems to you most reasonable and just, under the instructions the court has given you."

3d. Because the jury found contrary to the charge of the court in this, that the court charged the jury that "if you apply the payment yourselves it would be well to say so in your verdict," which instructions the jury failed to follow, as will be seen by reference to the verdict.

The motion was overruled, and defendants excepted.

C. F. CRISP, for plaintiffs in error.

No appearance for defendant.

TRIPPE, Judge.

1. The facts of this case are about these : Plaintiff in error sent to defendants in error enough cotton, which they sold,

and for an amount sufficient to pay the principal and legal interest on both the debts he owed them. We say nothing as to the counsel fees which were agreed to be paid in the contracts. If these were due and collectible, there would be a small deficit. The money in the creditors' hands had not been appropriated to either debt, and suits had been brought on both. The defense was usury and payment. On the trial of the suit for one of the debts, it was competent for the jury to apply enough of the amount so received by the creditors to its payment.

2. And if there be enough in the hands of the creditors to discharge what is legally due and collectible on both debts, the defendant may show that fact, and if it so appear, he is entitled to a verdict. There can be no difficulty in this. If the creditors have the money sufficient to pay both debts, have not appropriated it to the payment of either, the law, through the court and jury, will so appropriate it that the legal rights of both parties will be protected. Had the money been applied to the payment of one of the debts, say the larger, and that left but a small amount for the one on trial, the question might have been different as to how the pleas should have been framed as to the usury that had been paid, and the charge of the court would have been more appropriate. But both debts were sued on, no credit was on either ; the plaintiffs were, so far as it appeared, claiming all, and the defendant set up that he had put cotton in their hands for which they received money enough to pay what was legally due on both ; that no application of the money had been made, and as the whole question was before the court, he asked what he had a right to ask, that it should be ascertained what he did owe, and that the application of the money be made accordingly. The law will do this "in such manner as is reasonable and equitable :" Code, section 2869.

3. Under this state of facts, where there are two separate suits pending, the verdict should show how the money is appropriated by the jury on the trial of one, so that it would be a guide in determining how much remained to be applied to

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the other. If the jury find there is usury in the case tried, they should state how much they do find to be due on that debt, and how much of the fund in the hands of the creditors is applied to its payment. This could be done, and it might be necessary that it be done, although there be a verdict for the defendant. Sections 3559, 3560, 3562, of the Code, make provisions for just such verdicts. As the charge of the court was in conflict with what we think is the proper rule that should have been given to the jury, and as they evidently were controlled by it, the defendant below is entitled to a new trial.

Judgment reversed.

PARK & IVERSON, plaintiffs in error, *vs.* THE PIEDMONT AND ARLINGTON LIFE INSURANCE COMPANY, defendant in error.

1. The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication, but cannot enlarge the meaning of words plainly expressed therein.
2. Where justification was pleaded to an action for a libel which is neither ambiguous nor uncertain, it was not error in the court to charge the jury that they would not determine whether the innuendoes were true or false, but would consider whether the defendant had proved that the published language was true.
3. Whether the language of the publication did or did not charge the plaintiffs with having embezzled the defendant's money, or whether it charged them with having fraudulently appropriated the same, were questions of fact for the jury to determine from the plain, unambiguous language of the alleged libel itself, without any intimation or expression of opinion by the court, as to what offense the publication charged, or whether any was charged.
4. Where the publication charges the plaintiffs, who were insurance agents, with failure to remit premiums collected, it was error in the court to refuse to charge the jury that if the plaintiffs, in good faith, claimed an amount due them as commutation, which defendant refused to allow, and therefore plaintiffs did not settle, then they cannot be truly charged with embezzlement, or fraudulently appropriating the money of defendant to their use, although, on a trial afterwards, it

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may have been determined that they were not entitled to such demand.
(WARNER, C. J., dissented from this head note.)

5. Where a charge, if given as requested, would not have changed the verdict, its refusal, though error, is no ground of new trial.

Libel. Innuendo. Justification. Charge of Court. New trial. Immaterial error. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Park & Iverson brought case against the Piedmont and Arlington Life Insurance Company for libel, estimating their damages at \$20,000 00. The declaration contained two counts. the first being substantially as follows: Plaintiffs being insurance agents, the defendant published in two newspapers, the Columbus Sun and Columbus Enquirer, the following card:

"Messrs. Park & Iverson, as agents of the Piedmont and Arlington Life Insurance Company, having failed to report and remit the premiums collected, in accordance with the rules of the company, their agency is from this time canceled, and policy holders are warned against making payments to them."

Meaning and intending, in the said libelous matter, to charge and accuse plaintiffs with having received premiums for policies of insurance, and corruptly and dishonestly failing to report the same to defendant, and meaning and intending in said libelous matter to accuse them of having collected money from policy holders as agents, and of having embezzled the same.

The second count was in substance as follows: On February 1st, 1871, the defendant published the following circular:

"Messrs. Park & Iverson, of Columbus, Georgia, no longer represent the company. Their agency was revoked because of their failure to report and remit to us the premiums they had collected. They not only refused to settle with us, but refused even to turn over the books and papers of the agency. We regret exceedingly the course Messrs. Park & Iverson have chosen to pursue, but as guardians of a fund, sacred to

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the use of widows and orphans, we can never admit, and shall use every available means to prevent any misappropriation of it."

Meaning that plaintiffs had wrongfully and improperly refused not only to account with defendant for moneys received by plaintiffs, but had also wrongfully refused to turn over the books and papers of the agency. Also meaning to charge and accuse plaintiffs with misappropriating a fund sacred to widows and orphans, and with embezzling the same.

The defendant pleaded justification.

The evidence is unnecessary to an understanding of the case. For the remaining facts, see the decision.

R. J. MOSES; M. H. BLANDFORD, for plaintiffs in error.

INGRAM & CRAWFORD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant, to recover damages for publishing a libel of and concerning them as insurance agents for defendant. The defendant admitted its publication, and alleged in its plea that the facts stated therein were true. On the trial of the case the court charged the jury that the language of the alleged libel was not ambiguous or uncertain, and that the innuendoes in the plaintiffs' declaration did extend the meaning of the language set out in the publication, that such being the case the jury would not determine whether the innuendoes were true or false, but would, from the evidence, determine whether the defendant had proved that the published language was true; if so, they should find for the defendant, if not, then for the plaintiff. The plaintiffs requested the court to charge the jury that the language, charged as published in the first count of the declaration, may be construed to mean that plaintiffs embezzled the money of defendant, and it is for you to determine from the evidence whether, by this publication, the defendant intended to ascribe embezzlement to plaintiffs. The

language charged as published in the second count of the declaration may be construed to mean that plaintiffs fraudulently appropriated the money of defendant, and it is for you to determine from the evidence whether the defendant intended to ascribe to the plaintiff a fraudulent appropriation of money. If you believe from the evidence that plaintiffs, in good faith, claimed the amount due them for commutation which defendant refused to allow, and therefore plaintiffs did not settle with defendant, then plaintiffs cannot be truly charged with embezzlement, or fraudulently appropriating the money of defendant to their use, although on a trial afterwards it may have been determined that such commutation was not a proper charge against the defendant. The foregoing three requests to charge the jury were refused by the court, and the plaintiffs excepted. The plaintiffs also excepted to the charge of the court as given to the jury.

1. In our judgment there was no error in the charge of the court to the jury, on the statement of facts contained in the record. The language of the publication was neither doubtful or ambiguous. The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication, but cannot enlarge the meaning of words plainly expressed therein. If the plain, unambiguous words contained in the publication do not impute a criminal offense, the meaning thereof cannot be enlarged or extended by an innuendo for that purpose; but when the language used is capable of being understood in a double sense, the one criminal and the other innocent, the plaintiff, by making the proper allegations in his declaration, may, by an innuendo, aver the meaning with which he thinks it was published, and the jury may find whether the publication was made with that meaning or not. The truth of an innuendo cannot be proved at the trial; its truth must always depend on the proof of precedent facts which would authorize the innuendo to be made. If the precedent facts alleged in the plaintiffs' declaration do not make out a cause of action against the defendant, an innuendo cannot do it. The plain, unambiguous language of the publi-

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cation either imputed a criminal offense to the plaintiffs or it did not, and whether it did or not, the defendant alleged that it was true, and that was the issue to be tried. The issue to be tried was whether the language contained in the publication made by the defendant of and concerning the plaintiffs, according to the plain import and meaning thereof, was true or not ; and that was the question which the court submitted under the evidence in its charge to the jury.

2, 3. The two first requests made of the court to charge the jury will be considered together, as both involve the same principle. By the 3248th section of the Code it is declared to be error for the superior courts to express or intimate an opinion as to what has or has not been proved, in its charge to the jury. The first request asked the court to say to the jury that the language contained in the publication offered in evidence did mean to charge the plaintiffs with having embezzled the money of defendant. The second request asked the court to say to the jury that the publication offered in evidence did mean to charge the plaintiffs with having fraudulently appropriated the money of defendant. If the language contained in the unambiguous publication may be construed to mean certain things, then it does mean them, and that is what the court was requested to charge the jury. Whether the language of the publication did or did not charge the plaintiffs with having embezzled the defendant's money, or whether it charged them with having fraudulently appropriated the defendant's money, were questions of fact for the jury to determine from the plain, unambiguous language of the publication itself, without any intimation or expression of opinion by the court as to what offense that publication charged against the plaintiffs, or whether it charged any offense against them. Whatever charge the publication did contain, the defendant alleged to be true, and was bound to prove the truth thereof at the trial, and that was the issue between the parties. The practical effect of these two requests to charge, was to require the court to say to the jury what was the meaning and import of the language contained in the pub-

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lication, instead of leaving that question to the jury, whose province it was to determine it, without any intimation or expression of opinion by the court in relation thereto. We find no error in the refusal of the court to give in charge the two first requests of the plaintiffs set forth in the record.

4. It is my individual opinion that the third request to charge was properly refused by the court, in view of the facts contained in the record, because it assumes that the language of the publication did charge the plaintiffs with embezzlement, or a fraudulent appropriation of the defendant's money, but the majority of the court are of the opinion that the third request should have been given.

5. Inasmuch, however, as the refusal of that request did not hurt the plaintiffs, as the verdict under the evidence ought to have been as it is, even if that request had been given in charge, we all concur in affirming the judgment.

Let the judgment of the court below be affirmed.

THE CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* JAMES WOOD, defendant in error.

1. In an action upon the case against a railroad company, it was charged in the declaration that the defendant had stopped and dammed up a stream of water with an embankment, and caused a pond of water to accumulate and remain, and that thereby the plaintiff's family had been made sick, and he had been put to great expense and loss of time, etc. On the trial it was proposed to amend the declaration, and charge that defendant had thrown up an embankment in altering the locality of its road-bed, and had in so doing turned up and exposed to the sun and air, earth that had before been unexposed, and had thus produced malaria and caused sickness in the plaintiff's family, etc. The judge refused to allow the amendment, and there was a verdict for the defendant, and a motion for a new trial on various grounds. The judge granted the new trial on the ground that he erred in refusing the amendment, but overruled the motion on the other grounds:

Held, that the amendment was properly refused. It was a new cause of action, and under section 3480 of the Code an amendment introducing a new cause of action is not allowable.

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2. When on a trial before a jury the court commits error of law, but the verdict is such as is required by the evidence, and must have been the same had there been no error, a new trial ought not to be granted for such error.

Amendment. New trial. Before Judge HILL. Bibb Superior Court. October Term, 1873.

James Wood brought case against the Central Railroad and Banking Company for \$20,000 00 damages, alleging that the defendant had dammed up a stream of water causing a pond, whereby malaria arose, producing sickness in the family of the plaintiff and putting him to great expense, trouble, loss of time, etc. In the course of the trial, the plaintiff proposed to amend his declaration and charge that the defendant had thrown up an embankment in altering the locality of its roadbed, and in so doing had turned up and exposed to the sun and air, earth that had been before unexposed, and had thus produced malaria, causing sickness, etc. The court refused to allow the amendment, and the plaintiff excepted.

The evidence is unnecessary to an understanding of the decision. It failed to sustain the case sought to be set up by the plaintiff.

The jury found for the defendant. The plaintiff moved for a new trial on the following grounds, among others :

1st. Because the verdict was contrary to law.
2d. Because the court erred in refusing to charge the request of the plaintiff, as follows : "That if the jury believed from the evidence that the defendant, by reason of its construction of the embankment and the backing of the water consequent thereon, produced sickness in plaintiff's family, the plaintiff is entitled to recover."

3d. Because the court erred in refusing to charge the following request: "That in considering the question of whether the defendant's conduct in regard to said embankment and pond caused the sickness in plaintiff's family, the jury may take into consideration the excavations of earth, and the exposure of the same to the sun, and the malaria arising therefrom, if they believe such resulted in injury to plaintiff's

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health and that of his family, and that such excavations and exposure, etc., were made by defendant or his servants and agents."

4th. Because the court erred in charging the jury as follows : "It is not denied that plaintiff's family was sick the year this was done, 1870, and since, in 1871 and 1872, to a less extent. The question for you to ascertain is how much of this sickness (if any) was caused by this pond over and above what the stream and ground covered by the pond would have done without the dam and pond—that is, how much more marsh and bog would be exposed to overflow and sun. In order to determine this, you will carefully scan the testimony as to the effect of this ground being covered with water instead of being left exposed to the sun. Also, look to other exposures of Wood's residence to other sources of malaria, other ponds, if any, the river and river swamp, if near and accessible, their malaria and the large excavations of fresh cuts lawfully used in making the embankment in 1870; also, look to the precautions taken by the defendant to prevent damage from the pond—two culverts put in of a size, that one had proved sufficient to carry off surplus water in the old embankment across the stream—the clearing up of the ground covered by the pond, etc., and after examining all this, you will find your verdict for the plaintiff or defendant as the case may be."

5th. Because the court erred in refusing to allow the amendment aforesaid.

The court ordered a new trial upon each of the aforesaid grounds, overruling the others, and defendant excepted.

R. F. LYON ; S. D. IRVIN ; JACKSON, LAWTON & BASSINGER, for plaintiff in error.

JACKSON, NISBET & BACON, for defendant.

McCAY, Judge.

1. The action in this case was for erecting a pond, and thereby, as a consequence of such erection, causing sickness in

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the plaintiff's family. Were the pond a mere incident to the embankment there might be some ground for the claim that the amendment is only another mode of stating the same cause of action. But the evidence is clear, and the proposed amendment conforms to the same idea that the embankment and the pond are different enterprises. Ordinarily, water is allowed to pass through a railroad embankment by a culvert. But the railroad company here *undertook to make* a pond. The water was gathered, dammed up around a tube or well until it rose to a certain height, when it ran over into the well, and thence down the well into the culvert and under the embankment. It was the *purpose* of the company to make a pond, and it was for making this pond that the action was brought. The damages were laid as flowing by consequence therefrom. The amendment introduces the embankment as the cause of the damage, and claims that defendant has become liable, not for erecting a pond, but for throwing up the hitherto covered up earth, and exposing it to the sun and air, and forming the malaria in it, so as to cause sickness, etc. These are essentially different causes of action. The verdict, as it stands, is clearly no bar to a new suit for erecting the embankment. Our law permits any number of torts or contracts to be joined in one suit. But section 3453 of the Code expressly enacts that no new and distinct cause of action shall be introduced by way of amendment. We think this is a new and distinct cause of action, and that it was proper, under the express words of the Code, to refuse it. It follows that the new trial should not have been granted on this ground.

2. But it is contended that admitting this, the judgment granting the new trial is right, because the other grounds are sufficient. True, the judge overruled these grounds, but if the judgment was right it is immaterial what reason the court gave for it. We recognize this as a sound position, except so far as that in considering these grounds this court is to treat them as not sufficient, in the *discretion* of the judge, to authorize a new trial. We think there were errors committed by the court in his rulings on the trial. He should have given

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the charge asked for as to the right of the plaintiff to recover the value of the drugs, etc., if it were proven that the pond caused the sickness, and we think there was rather too much particularity in pointing out to the jury the considerations unfavorable to the plaintiff's case. We are not satisfied either, with the charge as to the medical books. It gave a sanction to the argument of the defendant based on those books that belongs only to sworn testimony. But we do not think these errors vitiate the verdict. Under the evidence it is a proper verdict. The plaintiff's case before the jury was quite a weak one. The pond very evidently was innocent of the damage claimed to be caused by it, and the jury must have found the same way had there been nothing in the rulings of the judge to complain of. The object of this court is not to correct abstract errors of law, but to interfere when parties suffer wrong from such errors. The question is not simply did the court err? But did he err to the *hurt* of the cause of the plaintiff in error. We do not think these errors hurt the plaintiff's cause before the jury. The verdict is a proper and just one under the evidence, and one that the jury must, with proper consideration of the facts, have rendered had none of the matters complained of occurred. As the amendment was properly rejected, we therefore think there ought to be no new trial.

Judgment reversed.

MATILDA C. MORRISON, plaintiff in error, *vs.* CHARLES LATIMER, defendant in error.

To entitle the owner of land to an injunction restraining an adjacent proprietor from continuing the improvement of his lot by grading and excavating up to the line of division between the two lots, on the ground that it is a trespass in removing the natural support of complainant's land, it should be made to appear that complainant's soil has been displaced by such excavation, or that it is of such character that it cannot stand by its own coherence, and that complainant's land will be materially damaged thereby. Under the facts in this case, we do not think the chancellor abused his discretion in refusing the injunction.

Morrison vs. Latimer.

Injunction. Land. Before Judge HOPKINS. Fulton county. At Chambers. December 11th, 1873.

Matilda C. Morrison filed her bill against Charles Latimer, making, in substance, the following case :

Complainant owns and lives on a lot in the city of Atlanta, on the west side of Washington street, fronting on same fifty-two and a half feet, and running back westward two hundred and fifty-five feet. The defendant owns a lot which bounds complainant's lot all along its north side. The surface of complainant's lot is more elevated than that of defendant's, except on the line where the two meet. In the natural condition of said two lots, the soil of defendant's furnished a sufficient and permanent lateral support to the adjacent and higher soil of complainant's lot, to which support complainant claims a right, and insists that defendant has no authority to deprive her of such support by excavating, digging down and removing the soil of his lot; yet, in disregard of her said right, said defendant has commenced digging down, excavating and removing the soil off his said lot in immediate connection and contact with the soil of complainant, and has made extensive progress in doing so. He has dug down and removed the soil along said dividing line some seventy-five to one hundred feet, and to the depth of from six to ten feet, said depth being variable, thus forming on the north line a perpendicular bank or dirt wall of the depth aforesaid, and he declares his intention to continue so digging down and removing the soil along the whole of said dividing line, without leaving any lateral support to the soil of complainant, and that he claims a right to do so. Should said defendant carry out his threats, the wall which will be thereby made along the whole of said dividing line will vary in depth from two to ten feet. The natural result of this excavation and removal will be the constantly recurring damage and injury to your complainant by the falling into the excavation so made of the soil of her said lot, all along said bank, thereby diminishing the extent of the width of the surface thereof from two to ten

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feet, according to the height of said bank, and to prevent which permanently, would require the erection of a rock wall ranging from one and a half to two feet in thickness, which would cost not less than \$600 00. Already defendant has by his said acts damaged complainant \$275 00, and will damage her still more unless restrained. Complainant has often notified defendant of her rights and urged him to desist, but he still perseveres. There are no houses or other improvements on her said lot anywhere near the said dividing line, and only the lateral support of the soil in its natural condition is insisted on.

Prayer that the defendant be enjoined from further proceeding with his excavation, and decreed to provide permanent support to that part which has already been dug down, and to pay the expense thereof.

The defendant filed an affidavit containing the following facts: Does not think he has damaged complainant's lot by his said grading, and does not think it will injure her for him to grade his in the manner complained of, which he does intend to do, etc. Defendant is able to respond for all damages, if any be sustained; thinks he has the right so to grade his lot; thinks it will greatly improve its value; has long intended to do so; no wish to injure complainant. Before complainant bought her lot defendant notified her husband that he intended so to grade his own.

The chancellor refused the injunction, and complainant excepted.

E. N. BROYLES, for plaintiff in error.

J. M. CALHOUN & SON, for defendant.

TRIPPE, Judge.

We do not deny the principle that the owner of land has not the right to excavate his soil to the line of an adjacent proprietor, so as to cause his neighbor's land to fall away, and thereby deprive him of the use of his land. It has been rec-

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ognized by a long line of authorities and by distinguished judges ever since it was first announced by Rolle, in his statement of the case of *Wilde vs. Minsterly*, in the time of Charles I: 2 Rolle Abr., 564, Title, Trespass; See *Humphries vs. Brogden*, 1 Law and Equity Reports, 241; 3 B. & A., 871; 4 Paige, 169; 2 Coms., 159; 21 Barb., 409; 2 Washburn on Real Prop., 75; Kerr on Injunction, 366. Nor does the decision in the case of *Mitchell et al., vs. Mayor and Council of Rome*, 49 Georgia, 19, conflict with or deny this principle. The question decided in that case was that the owner of a building erected on the line of his lot cannot, in Georgia, by *lapse of time*, acquire a *prescriptive* right to the lateral support of the adjacent soil, especially against a public or a municipal corporation.

But the case under consideration was an application for an injunction to restrain the owner of adjacent land from improving his lot by excavating his soil to the line of complainant's lot. The bill does not charge that any damage has resulted to the land of complainant, or that the character of his soil is such that it cannot stand by its own coherence. There is a statement that the defendant has removed the soil for a space of seventy-five or one hundred feet, and that complainant has been injured \$275 00. But the connection in which that statement is made shows that it was intended to mean that it would cost that amount for complainant to put up an artificial wall along the line of excavation. It does not appear that any of complainant's soil has been displaced, or that it necessarily must be, to an extent that will materially affect the value of her land. To arrest by injunction the improvements that are necessary in cities and towns on the ground that the digging and grading which are required for the use and enjoyment of a lot, is an injury to an adjoining proprietor, a clear case of damage, actual or inevitable, should be made out. In *Smith vs. Thackerah*, 1 Common Bench, 524, as stated in 2 Washburn on Real Property, the doctrine seems to be sustained that if the digging would not have caused any appreciable damage to the adjacent land in its natural state, it would

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not be the ground of an action. And in the same connection, 9 H. L. cases, 503; E. B. & E., 622; 6 H. and Norm., 454; 4 *Ibid.*, 186, are referred to. Where the nuisance or the damage apprehended is doubtful or contingent, equity will not interfere by injunction, but will leave the party to his remedy at law: *Ellison vs. Commissioners, etc.*, 5 Jones' Eq., 57; 6 *Ibid.*, 83; 2 Black, 552; 36 Alabama, 546.

As already stated, complainant does not show that her soil has been displaced, or that her land must necessarily be damaged so as to require the strong arm of equity to restrain the defendant from further improving his lot. The defendant denies, by affidavit, that there has been any damage, or that, in his judgment, there will be any to complainant's land. If any does result the defendant is fully able to respond. The complainant in fact shows by her bill *the amount of damage* she may suffer on account of the alleged trespass, and alleges that it would require \$600 00 to sustain the dirt wall which would be left by the excavation. This fact, in view of the section of the Code hereafter cited, is entitled to consideration in determining whether the chancellor abused his discretion in refusing the injunction to arrest the defendant in the improvement of his property after one-half of it has been accomplished. In *Farrand vs. Marshall*, 21 Barbour, 409, such an injunction was granted. But the complainant's land had already, when the injunction was applied for, been caused to crack and subside, on account of the excavation, for a great portion of two sides of the lot, and which also seriously endangered the dwelling house. The fear of the complainant in this case is that some of her soil may fall away, and her lot thereby become damaged. Equity will not interfere to restrain a trespass unless the injury is irreparable in damages, or the trespasser is insolvent, or there exists other circumstances which, in the discretion of the court, render the interposition of this writ (injunction) necessary and proper, among which shall be the avoidance of circuity and multiplicity of actions: Code, section 3219.

We think that under the facts of this case the complainant

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should be remitted to her action at law, if she does in fact suffer damage, rather than to establish a rule which would, on the ground of apprehended damages, so seriously interfere with the improvements that city and town lots necessarily require.

Judgment affirmed.

WILLIAM WRIGHT, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

When a recognizance has been forfeited, the law requires that the clerk shall issue a *scire facias* thereon, returnable to the next term of the court; and if such officer allow the next term to pass, and then issued a *scire facias*, it was error in the court to render judgment thereon against the security at the succeeding term.

Criminal law. Recognizance. Bond. *Scire facias*. Before Judge HOPKINS. Clayton Superior Court. September Term, 1873.

For the facts of this case, see the decision.

COLLIER, MYNATT & COLLIER, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

WARNER, Chief Justice.

At the March term of Clayton superior court, 1872, a true bill was found by the grand jury against Peacock for the offense of fornication, who entered into a recognizance for his appearance at the September term, 1872, of said court, to answer said charge, with one Wright as his security. At the September term of the court, 1872, the said Peacock failed to appear, and his recognizance was adjudged by the court to be forfeited, unless at the next term of the court thereafter, to-wit: at the March term, 1873, the defendants should show cause why the judgment of forfeiture should not be made

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final, and a *scire facias* was ordered to be issued. This judgment *nisi* is dated 3d September, 1872. No *scire facias* was issued in accordance with that judgment of the court returnable to the next March term, 1873, but a *scire facias* was issued by the clerk on the 23d of June, 1873, requiring the defendants to show cause at the September term of the court, 1873, why the said judgment *nisi* should not be made absolute and judgment entered for the full amount of said recognizance. At the September term, 1873, the court entered a final judgment on the recognizance against Wright, the security, the principal, Peacock, not to be found. Whereupon Wright, the security, excepted. The security has the right to insist that his liability to pay the recognizance should be fixed on him according to law. The law requires that when a recognizance has been forfeited, the clerk shall issue a *scire facias* thereon, returnable to the next term of the court, which shall be served at least twenty days before the return thereof, and if at such return term no sufficient cause be shown to the contrary, judgment, on motion, shall be entered against such principal and sureties, or such of them as have been served : Code, section 4703. In this case, the judgment *nisi* forfeiting the recognizance was rendered in accordance with the law, but the *scire facias*, as issued by the clerk, was not issued in pursuance of that judgment, or in accordance with the law, and it was error in awarding a judgment against the security on that *scire facias*. In rendering this judgment, we do not intend to express any opinion as to the right of the state again to forfeit the recognizance, or to have the judgment forfeiting it modified or amended, so as to have a *scire facias* issue in accordance with the provisions of the law and a judgment rendered thereon. We leave the parties to act in relation to that matter as they may deem proper. All that we now decide is, that the judgment rendered on the *scire facias* should be set aside as error.

Let the judgment of the court below be reversed.

Solomon *vs.* Lochrane.

WILLIAM SOLOMON, plaintiff in error, *vs.* OSBORNE A. LOCHRANE, defendant in error.

The charge of the court on the trial of this case was not so unfair to the plaintiff in error as to require this court to reverse the judgment refusing a new trial.

Charge of Court. New trial. Before Judge HILL. Bibb Superior Court. April Term, 1873.

This is the second time this case has been before this court:
Vide 38 *Georgia*, 286.

Solomon brought complaint against Lochrane on a note for \$1,000 00, dated October 6th, 1858, and due at sixty days. The defendant pleaded that at the time of the making and delivery of said note he also executed to the plaintiff, as collateral security for the payment thereof, a mortgage on a certain printing office, press and fixtures, of the value of \$5,000 00, located at Griffin. That upon the maturity of said note, the defendant, in order to raise money to meet the same, sold said mortgaged property to one Robert A. Crawford, upon the express agreement that he would at once pay off said note and mortgage; that this was the only portion of the purchase money which was to be paid in cash; that defendant and Crawford went to the plaintiff, notified him of the trade, and Crawford not being able to make immediate payment, all parties agreed to wait for a few days on him; that notwithstanding this, the plaintiff, without the knowledge or consent of defendant, extended the time of the payment to be made by said Crawford for the period of four months, for and in consideration of two and one-half per cent. per month being paid to him for such extension; that defendant had notified plaintiff to proceed immediately to foreclose said mortgage in case Crawford did not pay at the time originally agreed on; that the mortgaged property was subsequently destroyed by fire, by which it became lost to the plaintiff as a security to said note, and to this defendant. Wherefore, defendant says that the plaintiff is not entitled to

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recover from him. Also, that the plaintiff accepted Crawford as his debtor to the discharge of the defendant.

The evidence is omitted as unnecessary to an understanding of the decision.

The jury found for the defendant.

The plaintiff moved for a new trial because the court erred in repeating to the jury the grounds taken by the defendant's counsel in his argument, (those embraced in the foregoing pleas) and then simply stating, "this is denied by the plaintiff," and in adding: "If you find that the facts, as claimed by the defendant, are established by the testimony, then you will find this issue for the defendant, and you need not, in that event, go into an examination of his other defenses."

The motion was overruled, and plaintiff excepted.

POE & HALL, for plaintiff in error.

R. F. LYON; JACKSON, NISBET & BACON, for defendant.

McCAY, Judge.

Under the decision of this court, when this case was before us at a previous term, the verdict of the jury on the second trial turned entirely upon the evidence. No complaint is made that the judge erred in any principle of law in his charge, or that there were any rulings upon the evidence which the plaintiff in error has a right to complain of.

The point mainly insisted on is that the judge did not put the plaintiff's case fairly to the jury. That in his charge he brought out prominently the defendant's side of the case, while that of the defendant was left to make its own way to the minds of the jury. We recognize the principle insisted on; that a judge, in his charge, if he sum up the evidence at all should be very careful to do full justice to both sides. A judge occupies, to the jury, a position of confidence and respect. Even in matters of evidence they defer to him, though they may be fully aware that this is their own especial field, and it is the duty of the judge to weigh closely all he says,

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so that the case may go to the jury unaffected by any opinion he may have of its merits, so far as the facts are concerned. But after a careful scrutiny of the record we cannot say that Judge Hill, in this case, has violated the rule we have alluded to. It is often difficult to state the principle of law applicable to the facts of a case, without at least a hypothetical allusion to the facts, and whilst, as a general rule, it is proper for a judge to give to a jury, not only the law upon the hypothetical case put, but also the converse of the hypothesis, yet this is not always necessary. A jury is presumed, and generally truly, to be composed of men of ordinary sense, and it is unjust to them, as well as to truth, to suppose them incapable of ordinary discrimination.

In this case the plaintiff's evidence consisted in the main of his note. The defendant set up a state of facts which he contended released him from the obligation to pay it. The judge put the defendant's case, in each of its aspects, to the jury, stating if they believed either of these aspects to be sustained by the evidence they should find for defendant. He did not state the counter-proposition as to each point. But as the plaintiff relied upon his note, the counter-proposition was necessarily true if the hypothesis put was not sustained. We can see nothing in this to mislead a jury of ordinary capacity, and whilst we can conceive of a charge putting the plaintiff's case stronger and the defendant's weaker than the judge did, we do not think the charge is so onesided as to demand, under the evidence, a new trial.

Judgment affirmed.

JAMES F. HANSON, plaintiff in error, *vs.* ROBERT CRAWLEY,
defendant in error.

1. When a defendant pleads that he is security to the note sued on, and that it has been altered without his knowledge or consent, he is not entitled to take a verdict, on the plaintiff's closing his case after introducing the note in evidence without other testimony.

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2. If a motion to non-suit should have been sustained in that stage of the case, yet if the defendant, after it is overruled, proceeds, and both he and plaintiff introduce evidence on the issue made by the plea, and the evidence is sufficient to sustain a verdict for plaintiff, it will not be set aside and a new trial granted because of the refusal by the court to grant the non-suit.
3. If the defendant put in evidence the testimony of the principal as to what he said to the payee at the time the words were added to the note which are complained of, for the purpose of showing that he, the principal, was to be exclusively bound for the additional liabilities caused by those words, it is competent for the plaintiff, in rebuttal thereof, to prove all that the principal said at the time, as part of the *res gestae*. And if such proof be not competent to charge the security with knowledge of and consent to the change, he should ask the court, by its charge to the jury, or when the evidence is admitted, so to limit its effect.
4. There was no abuse of the discretion of the court in refusing to grant a new trial on the ground that the verdict was against the weight of the evidence.

Promissory notes. Contracts. Alteration. Non-suit. Practice in the Superior Court. Evidence. Principal and security. New trial. Before Judge BARTLETT. Morgan Superior Court. March Adjourned Term, 1873.

This is the second time this case has been before the supreme court: See 41 *Georgia*, 303.

Robert Crawley brought complaint against James J. Morrison, as maker, and James F. Hanson, as security, for \$650 00 in gold, besides interest, on the following note:

“\$650 00. Twelve months after date, I promise to pay Robert Crawley, or bearer, six hundred and fifty dollars, for value received of him—cash borrowed. Nov. 17th, 1865.

(Signed)

“J. J. MORRISON,

“J. F. HANSON, security.”

“I agree to pay the above in gold, having received it in gold. (Signed) J. J. MORRISON.”

To this suit, Morrison making no defense, Hanson filed his plea, alleging that he was only security on the above note; that

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he was not interested in the consideration ; that the terms of the contract had been changed since he signed the note, by the addition of the words, "I agree to pay the above in gold, having received it in gold," the same having been placed on said note since the signing, with the knowledge and consent of the plaintiff, and without the knowledge or consent of defendant, and that, by reason of said addition, (the terms of the contract being altered, and the note made payable in gold,) he was discharged.

On the trial of the case the plaintiff introduced the note and closed. Defendant moved to take a verdict, upon the ground that the note showed upon its face that the terms of the contract had been altered and enlarged since the signing, and that all knowledge and consent being denied, the *onus* was upon plaintiff to show that the original contract was for gold, and known to be for gold by the security at the time of signing. This motion was overruled by the court, and defendant excepted.

Defendant then introduced the following evidence :

James F. Hanson testified as follows : He was security only on the note sued on, and had no interest in, and derived no benefit from, the consideration of said note. The words, "I agree to pay the above in gold, having received it in gold," were not on said note when he signed it, nor did he know they were on the same until served with the copy declaration when suit was brought. Never said to Robert Crawley, as testified to by him in his deposition, that it was a gold note, nor asked him if it was not a gold note, but did say to him it was a good note, as his (Hanson's) name was to it. Did not know that the note was given for the purchase of cotton when he signed it, nor for some time afterwards. Crawley was not present when witness signed the note, nor did he (Hanson) know, at the time of signing, anything of the consideration being other than currency. Never heard any conversation between Morrison and plaintiff in regard to consideration of said note. Morrison and witness married sisters, and lived about two miles of each other; and at the time the note was

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signed, he was arranging to go into business with Morrison. Had had some conversation upon the subject, but had agreed upon no terms. The money borrowed was not for the purpose of going into business with witness. Witness, Morrison and another party, did go into business together in the spring of 1866. Witness did have a conversation with Crawley on the way to Winfrey's, and had several conversations with him at Rutledge and Madison after the note became due.

Deposition of James J. Morrison: The copy note attached to interrogatories is a correct copy of the one made by me to Crawley. Hanson signed it as security only. He was not interested in the consideration, nor was he to derive any benefit from it. The words, "I agree to pay the above in gold," etc., were affixed to said note after it was signed by Hanson. It was in my handwriting, made by me and accepted by Crawley, as it was my impression it would not be legal to make a note payable in gold, and as I was to pay it in gold, I made this separate agreement on the note, and so stated to Mr. Crawley at the time. Hanson was not present when the words were added, and it was done without his knowledge or consent. I made the indorsement to prevent the note from being void, as I thought, and also explained that I alone would be responsible for the difference between greenbacks and gold.

Deposition of Robert Crawley, the plaintiff: I sold the cotton to Morrison; he offered me, through R. J. Moseley, thirty cents in gold or forty-five cents in currency, to make a good note and pay good interest. He proposed to give Ed. Cox and Hanson as security. I told him Hanson would do. Morrison sent for the cotton on the next day, and set a time for me to come and get the note with Hanson's name to it. When the time arrived, he asked me to wait a few days longer, as Hanson had not yet arrived from Atlanta. The note simply called for \$650 00, without mentioning the kind of currency. I asked him why he did not state in the note it was to be paid in gold. He stated that the supreme court had decided that if it was so stated it could not be collected, and then remarked—

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"We all understand the conditions of the note, it is for gold," alluding to those interested in the note. I told him I would rather have a showing, but not on the note. He continued to argue the point until he put it down on the note. I had no conversation with Hanson until the next fall; I met him on the way to Winfrey's sale. He commenced conversation about the note; that was a short time before the note was due. He wanted to know if I was obliged to have the money when due, or would I wait longer. I remarked that "I should like very well to have it, as Morrison was going into bankruptcy, and he was only trustee for his wife, which I did not know at the time I let him have the cotton." He replied, "Oh, that note will be paid, because my name is to it." We had no further conversation about it till after the note was due. Then we had frequent conversations, in one of which he asked me if it was not a gold note. I said it was, and he remarked that he thought so. He said Morrison got in a tight for money, and that was the reason he bought the cotton. Shortly after the note was due, Hanson again remarked to me that the note would be paid, because his name was on it. The note was presented to me at Morrison's; Hanson was not present at the time. I am not deaf nor very hard of hearing.

The jury returned a verdict for \$650 00, with interest, in gold.

A motion was made for a new trial by Hanson, on the following grounds, to-wit:

1st. Because the court erred in refusing to allow a verdict for defendant after plaintiff had closed.

2d. Because the court erred in allowing counsel for plaintiff to read to the jury that part of Robert Crawley's answers relating to conversations and declarations made by Morrison when Hanson was not present, in regard to the consideration of the original note signed by Hanson as security, and particularly that part of said answer contained in said words: "We all understand the condition of the note—it is for gold, alluding to those interested in the note."

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3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled and defendant excepted.

BILLUPS & BROBSTON, by brief, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

TRIPPE, Judge.

1. A defendant has not the right to ask the court to direct the jury to give him a *verdict* on the conclusion of plaintiff's evidence, because the plaintiff has not made out his case. He may move for a non-suit, which a court might properly grant, or the defendant could go on to the jury with the evidence already before them, and claim that he is entitled to a verdict on the ground that no case is made out against him. But the court will not, on motion, summarily order a verdict for defendant. A motion for a non-suit at that stage of the trial is the proper way to raise the question before the court, whether there is sufficient evidence to authorize or sustain a verdict.

2. But even if, in a given case, it were proper for the court to grant such a motion, or if a motion for a non-suit was made and rejected when it should have been allowed, and the defendant, not relying upon his rights as then existing, but, after his motion is overruled, proceeds, and both he and the plaintiff introduce further testimony, a verdict for the plaintiff, if sustained by the whole evidence, will not be set aside because of the refusal of such motion by the court. If the case is for the defendant when the motion is made, he should rely upon it as it stands. If testimony introduced afterwards authorizes a recovery by plaintiff, the verdict will be good. It is not vitiated by the rejection of the motion, nor is the subsequent proof thereby rendered illegal. A new trial will not be granted because of an error which has been condoned or rendered harmless, and which could not possibly have affected the merits of the case or the verdict.

3. The defendant put in evidence what the principal (Mor-

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rison,) said to the payee when the words were added to the note which are complained of. This was done for the purpose of showing that Morrison was only to be bound by the additional obligation, and therefrom an inference was to be drawn that Hanson was not a party to the change, nor to be affected by it; and, further, that by the understanding between Morrison and Crawley, he was not a party to or cognizant of the original contract for the payment of gold. If there was anything in the conversation that was stated by Morrison, and which was contradictory of such a construction, then Crawley was entitled to have it proved. The general rule is, that where one side proves a part of a conversation, the other has the right to have all of it given in. It may be said to be a part of the *res gestæ*. If such proof is admissible for a particular purpose, the court should be requested to put a proper limitation on it as to how far and for what purposes it may be considered by the jury.

4. This case has been before this court heretofore, and is reported in 41 *Georgia*, 303. The principle is therein recognized that the addition to a contract of what was a part of it as agreed on, and which was left out by mistake, was not such a change as would release the security. Judge McCAY, in that opinion, states it thus: "Had the fact been that the original contract was a specie contract, and the security knew it, and became security with that understanding, the mere fact that under a mistake of the law they left certain words out of the contract, which were afterwards put in by the principal, would not release the surety." That was the main question before the jury. Did the surety know it was a gold contract? There is no dispute that it was in fact to be paid in gold. The surety testified that he did not know it was for gold. The payee swore that the surety asked him if it was not to be paid in gold, and on an affirmative reply, he remarked he thought so. This was long after the words were added. The jury found for the plaintiff, and the court below was satisfied with the verdict. We cannot reverse his judgment. It may be added, that the principal does not state in

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his testimony whether or not his surety knew it was a gold contract.

Judgment affirmed.

HARRISON WILLIAMS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[McCAY, J., was providentially prevented from presiding in this case.]

1. An indictment charging the defendant with the forgery of a bank check, payable to the order of, should be quashed on demurrer.
2. The check was not payable to bearer nor to the order of any named person, and was therefore so incomplete and imperfect that no one could have been defrauded by it.
3. An indictment for forgery must specify the person intended to be defrauded.

Criminal law. Indictment. Forgery. Bank check. Before Judge SCHLEY. Chatham Superior Court. May Term, 1873.

For the facts of this case, see the decision.

THOMAS R. MILLS, Jr., for plaintiff in error.

No appearance for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of forgery. In the indictment he was charged with, falsely and fraudulently, making and signing a certain false, fraudulent and forged bank check, in the words, letters and figures, printed and written, as follows, to-wit :

“No. 76. Savannah, Ga., May 24th, 1873. Central Railroad and Banking Co. pay to the order of three hundred and sixty dollars. (Signed) J. LAMA.”

The defendant was also charged, in one of the counts of the indictment, with having falsely and fraudulently uttered and,

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published as true the forged and counterfeit check above described, knowing the same to be counterfeit and forged, with intent to defraud, but it is not alleged *who* he intended to defraud. On arraignment, the defendant demurred, in writing, to the sufficiency of the indictment, which demurrer was overruled, and the defendant excepted. The case then proceeded to trial, and the jury found the defendant guilty on the second count in the indictment. The exceptions to the charge of the court, and refusal to charge as requested, are substantially embraced in the exception to the overruling the demurrer, and will be considered together.

1. The demurrer to the indictment was on the ground that the bank check alleged to have been forged was incomplete, and could not have defrauded any one. The check was not payable to bearer, or to the order of any named person, and therefore was incomplete as a bank check, and could not have defrauded the bank or the drawer of the check.

2. In the case of *The People vs. Galloway*, 17 Wendell's Reports, 540, the cases bearing upon this question were reviewed, and the principle to be deduced from them is, that if the instrument alleged to have been forged is so imperfect and incomplete that no one can be defrauded by it, then the defendant cannot be convicted of that offense.

3. Besides, it is not alleged in this indictment that the defendant intended to defraud any person by the making, signing, uttering or publishing the instrument described in the indictment. The indictment alleges that it was done by the defendant with intent to defraud, but who he intended to defraud is not alleged. The court erred in overruling the demurrer to the indictment.

Let the judgment of the court below be reversed.

Engraham vs. Pate.

E. W. ENGRAHAM, plaintiff in error, vs. REDDING H. PATE, defendant in error.

When, on the trial of a claim to property levied on under an execution, the issue was whether the sale of the land levied on, by the defendant to the claimant, was fraudulent, and the plaintiff in execution offered to prove that about the time of the sale in question, the defendant had sold to the claimant, who was his son-in-law, all his other real estate: *Held*, that this was competent evidence to go to the jury on the question of fraud, and it was error in the court to reject it.

Claim. Evidence. Fraud. Before Judge HILL. Houston Superior Court. May Adjourned Term, 1873.

At the December term, 1872, of Houston superior court, E. W. Engraham recovered a judgment against one John Laidler for \$389 56, principal, besides interest and costs. The execution based on this judgment was, on January 18th, 1873, levied upon certain lands as the property of the defendant. A claim thereto was filed by Redding H. Pate. Upon the issue thus formed, the evidence made the following case:

The land levied on was conveyed by the plaintiff to the defendant, and the debt sought to be recovered is a portion of the purchase money thereof. Defendant sold and conveyed the land to claimant on July 25th, 1865, for \$1,000 00; deed recorded on February 25th, 1873. Claimant was the son-in-law of the defendant. At the time of the sale aforesaid the latter was insolvent. The purchase money was to be paid as the defendant might require the same for the payment of his debts. Defendant and claimant both testified that all of said purchase money had been since paid. Defendant was in possession at the date of the levy.

During the trial, the plaintiff proposed to prove by claimant and defendant that about the same time the land in controversy was conveyed to claimant, but in a different transaction, defendant also conveyed to claimant a valuable store-house and hotel in the town of Hawkinsville, and that this property, together with the land in dispute, comprised all the property owned by defendant at that time.

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Upon objection taken, the evidence was excluded by the court, and plaintiff excepted.

The jury found for the claimant. The plaintiff moved for a new trial because of error in the aforesaid exclusion of testimony. The motion was overruled, and plaintiff excepted.

DUNCAN & MILLER, for plaintiff in error.

WARREN & GRICE, for defendant.

McCAY, Judge.

We think the court should not have rejected this evidence. The issue on trial was one of fraud, and in such cases the field of circumstances ought to be very wide. It is but rarely that any direct proof can be had. The intent of the parties can in general only be got at by circumstances; sometimes any one of them may be very slight, taken by itself, but taken with others, may be a link in a chain, which, altogether, is very strong. Here is a man proven to be largely in debt. He claims to have sold fifteen hundred acres of land to his son-in-law, who, it is apparent, was not very abundantly able to buy and pay for it. The fact, if it be so, that about the same time he sold to the same son-in-law property in a different locality, in fact, all his real estate, is surely some evidence going to cast suspicion upon the transaction at present under investigation. It is a circumstance which, from its very nature, will affect the mind in coming to a conclusion upon the matter in issue. As a matter of course, it is but one fact, and did it stand alone it would not amount to much. But the evidence in this case leaves the transaction open to strong suspicion, and the verdict is by no means *demanded* by the evidence. Perhaps, had this additional fact gone to the jury the verdict would have been different. The rule we have laid down is, that if there be an improper exclusion of evidence, or any error calculated to *affect the verdict*, and the evidence actually and legally in be only sufficient to sustain and not to require the verdict, ordinarily there ought to be a new

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trial. We think this is such a case. The evidence ought to have been admitted; it might have affected the verdict, and the finding is only barely supported by the evidence.

Judgment reversed.

BENJAMIN H. HILL, plaintiff in error, *vs.* SHIRLEY SLEDGE, administrator, *et al.*, defendants in error.

Under the testimony introduced at the hearing, it was not an abuse of discretion in the chancellor to grant an injunction; but, from the special facts in the case, it should be modified, and it will be so ordered in the judgment.

Injunction. Before Judge BUCHANAN. Troup county.
At Chambers. December 11th, 1873.

Shirley Sledge, as administrator, and B. M. Curtright, as administratrix, upon the estate of Samuel Curtright, deceased, filed their bill against Benjamin H. Hill, and Hilliard Oneal and R. J. Butts, as executors upon the estate of James Oneal, deceased, making this case:

The estate of Samuel Curtright can only pay about fifteen per cent. of its indebtedness on promissory notes. On July 12th, 1859, Curtright became indebted by promissory note, to the defendant, Benjamin H. Hill, in the sum of \$600 00, upon which a payment of \$28 00 was made on March 14th, 1861. This note was indorsed by Hill to James Oneal. His executors commenced suit on the same against complainants as the administrator and administratrix of the maker, and Hill as the indorser. The latter, whom complainants regarded as their attorney, filed a plea to the action. At the November term, 1872, of the superior court of Troup county, Hill withdrew the plea, stated that he, as indorser, had settled with the plaintiffs, and asked an order that the case proceed for his use. The order was granted. The complainant, Shirley Sledge, being present, called the attention of B. C. Ferrill,

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who was an attorney at law, to the condition of the case. Hill then stated that as there was no plea filed, he would take judgment by default. Ferrill objected to such judgment before their plea of *plene administravit* was filed. The court stated that it would allow such plea to be entered. Hill thereupon stated that a judgment by default would not be conclusive against the complainants in a second suit for a *derastarit*; that he only wished his debt to be paid *pro rata* with other creditors of equal dignity; that he would only take a judgment for his *pro rata* share, and that it was best for the complainants to file no plea.

Complainant, Sledge, asked Ferrill what must be done. He replied that it would be all right, upon the assurances of Hill. Hill, then, without their knowledge or consent, entered a judgment for the full amount of the note. He has since commenced suit, in the name of the executors of James Oneal, for his use, upon the bond of complainants, alleging a *derastarit*. They pray that the aforesaid order and judgment may be set aside, and that the executors of Oneal and Hill be enjoined from prosecuting said suit, etc.

An order to show cause was issued by the chancellor, in response to which the defendant, Benjamin H. Hill, produced his affidavit to the following effect:

Every statement in the bill that he was of counsel for complainants is utterly untrue. He filed pleas only for himself, as they manifestly show. Equally false are the statements that he proposed to take a judgment for a *pro rata* share of the assets, and that he deceived the complainants, etc. The following is a true statement of what occurred: Defendant had hoped to obtain a judgment of discharge from any liability on said note, and filed pleas for this purpose only. Several years had elapsed after the suit had been brought, and complainants had neither filed any plea nor made known to defendant that they had any to file. He therefore proposed to the plaintiffs in that suit to pay the principal, strike his pleas, and take an order for the case to proceed for his use. This proposition was accepted and executed. He would never

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have abandoned his separate pleas if he had had any idea that the complainants contemplated filing the plea of *plene administravit*. Mr. Speer, whom he employed to represent him, moved for judgment against the complainants, as the case was in default. B. C. Ferrill, the counsel for the estate generally, as this defendant always understood, said something about filing a plea of *plene administravit*. Mr. Speer dared him to do it, saying that he had proof of assets. Mr. Ferrill asked this defendant as to the effect of such plea. He stated that if such plea was filed and assets were shown, a judgment *de bonis propriis* would result, but if no plea was filed, a judgment *de bonis testatoris* would only follow in that suit. Mr. Ferrill then seemed to hesitate, while Speer appeared to be daring him to file the plea. This defendant may have said to Ferrill that he wanted to make nothing out of the case, and that while he should take a judgment for the whole amount, yet if his clients, the complainants, would pay the sum agreed to be paid to the plaintiffs by him, the defendant, the whole debt should be entered satisfied. This proposition has always been, and still is, open to the acceptance of the complainants. Under these circumstances he entered his judgment. If the estate of Samuel Curtright is insolvent, which he does not believe, such result has been caused by the waste and mismanagement of the complainants.

The bill and the defendants' response were respectively supported by several intensely conflicting affidavits.

The chancellor ordered the injunction to issue as prayed for, and defendant (Hill) excepted.

B. H. HILL & SON; SPEER & SPEER, for plaintiffs in error.

FERRILL & LONGLEY, for defendants.

TRIPPE, Judge.

As the testimony before the chancellor at the hearing for the injunction was very conflicting, and as that offered by complainants was sufficient to show that there was no abuse

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of discretion in granting the writ, we affirm the judgment allowing the injunction. But we think that plaintiff in error has, under the admitted facts in the case, certain rights which should be protected. He is certainly entitled to a hearing before a jury on the bill, so that it may be determined whether his judgment shall not stand, as it has been rendered, with all his rights under it. One of these would be to use it as evidence of assets in the hands of the administrators on the trial of his suit on their bond. If a decree should be given in his favor, then the way would be easy in the action at law. Or, if he desire, he may proceed to a trial of his suit on the bond, and use his judgment as evidence of his debt, and as having preference over other debts of which the administrators did not have notice at the time it was rendered. But whilst the bill is pending and the injunction remains, the judgment is not conclusive evidence of assets in the hands of the administrators, at least cannot be used for that purpose on the trial of the case at law.

It has accordingly been so ordered in the judgment.

EARLY W. THRASHER, executor, plaintiff in error, vs. JAMES C. ANDERSON *et al.*, defendants in error.

Where a testator stated in his will that he held certain notes on a legatee which he was to pay into his estate, and after the death of said testator, the legatee, who had become executor of said will, produced a receipt for a large sum of money signed by the testator, stating that the amount therein mentioned was to be credited on the notes held by him, it was error for the court, on the trial of a bill for account filed against said executor by the other legatees, to charge the jury that if they should find the notes extinguished by the receipt, that the said executor should account for the same as an advancement. The question was whether said notes were extinguished during the life of the testator? If they were not, they could pass under the will; otherwise, they could not. The question of advancement was not involved.

Administrators and executors. Wills. Legacies. Advancements. Before Judge BARTLETT. Morgan Superior Court. March Adjourned Term, 1873.

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For the facts of this case, see the decision.

THRASHER & THRASHER; BILLUPS & BROBSTON; R. H. CLARK, for plaintiff in error.

REESE & REESE, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants as legatees against the defendant, as executor of the last will and testament of Barton Thrasher, deceased, to recover their respective legacies alleged to be due them under said will, which contained the following provisions:

"Item 2d. I have this day given, by deed of gift, to my son, Early W. Thrasher, fourteen hundred and three-quarter acres of land, which I consider worth \$7,179 00, for which amount he is to be charged and account in the final division of my estate. I also hold against him a promissory note for \$25,300 00, dated 15th September, 1864, being the renewal of a note I held against him before the war, and which note, so far as not paid during my life, he must pay into my estate after my death, so as to be accounted in the final division of my estate hereinafter provided for, and any note I may hold at my death against any of my legatees, bearing date at any time after the date of this will, or any receipt from any of them for any advancement out of my estate, bearing date as last aforesaid, is to be accounted against such legatee in the said final settlement of my estate. No other receipts or notes that may be found among my papers against any of my legatees, excepting the note on Early W. Thrasher, above named, to be taken into the account in said final division.

"Item 3d. I have given this day, by deed of gift, to my grand-daughter, Josephine V. Thrasher, eight hundred and thirty and one-half acres of land, which I consider worth \$3,322 00, for which amount she must account in the final division of my estate.

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"Item 4th. I have this day given to Early W. Thrasher, in trust, for the use and benefit of the children of my deceased daughter, Ascineth C. Overby, two thousand two hundred and fifty-six acres of land, which I consider worth \$13,536 00, with which amount the children of said deceased daughter must be charged and account for in the final division of my estate.

"Item 5th. I have this day, by deed of gift, given to the children of my deceased daughter, Susan C. Anderson, viz: to Lewis G. Anderson, the father and trustee, for their use and benefit, five hundred and ninety-five acres of land, which I consider worth \$2,975 00, with which amount the said children of my deceased daughter, Susan C. Anderson, must be charged and account for in the final settlement of my estate.

"Item 6th. I have, by deed of gift, dated this day, and by one dated heretofore, given to my son, John O. Thrasher, one thousand three hundred and nineteen acres of land, which I consider worth \$6,595 00. I have also heretofore given him, in money, \$5,147 00, which two amounts he is to be charged with and account for in the final division of my estate.

"Item 7th. I appropriate \$2,000 00 for the board, clothing and education of my grand-daughter, Ascineth C. Overby, and whatever of that amount is not expended on her for said purposes, during my life, I give and bequeath to her after my death. Said sum, nor any part, to be charged to her or her brothers and sisters in the final division of my estate, the others having received like advantages.

"Item 8th. After the payment of the \$2,000 00 provided for in the last foregoing item of this will, and the payment of my just debts, I will and direct that the whole of the balance of my estate of every description be divided among my children and grand-children before mentioned, taking into account the amounts I have given them and their trustees respectively, as heretofore set forth. That is to say, make my son, Early W. Thrasher, and my son, John O. Thrasher, the children of my deceased daughter, Susan C. Anderson, representing one share, and my grand-daughter, Josephine V.

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Thrasher, all equal with the amount which I have given to the children of my deceased daughter, Ascineth C. Overby, and then divide the balance of my estate equally among them, the grand children, when more than one, in a lot, viz: the children of my deceased daughter, Ascineth C. Overby, and the children of my deceased daughter, Susan C. Anderson, to be entitled in such division to the same amount as one of my children, and my grand-daughter, Josephine V. Thrasher, being the only living child of her father, is to share in the division as one of my children. It being my will and direction that my children and grand-children, each set of my grand-children claiming one share, also, Josephine V. Thrasher, as above set forth, be made equal sharers in my estate from first to last, and for the purpose of making said final division, I authorize my executors hereinafter named, to sell any or all of my property, either at public or private sale, as they may deem best, if in their judgment such division cannot be properly made without selling."

The will was executed October 14th, 1865.

The defendant, in his answer, alleged that the testator, after the making of his will, in view of the fact that the greater amount of the notes executed by him to the testator, including the note mentioned in the second item of his will, was for negroes, and that the testator had not charged the value of negroes against the other legatees, did, on the 18th day of April, 1867, execute and deliver to him the following receipt:

"Received of Early W. Thrasher twenty-seven thousand five hundred dollars, which is to be credited on three notes I hold on him, to be credited on the 4th of October, 1865.

(Signed)

"BARTON THRASHER."

One of the three notes mentioned in the receipt was dated prior to the execution of the testator's will; one for \$7,700 00 was dated 20th July, 1866, and the other for \$25,300 00 was dated 15th September, 1864.

On the trial of the case there was much evidence as to the execution of the receipt by the testator, the manner of its pro-

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curement, etc. The jury, under the charge of the court, found the following verdict: "We, the jury, find for plaintiffs the notes against defendant as advancement from Barton Thrasher, subject to equal division of said estate." A motion was made by the defendant for a new trial on the several grounds stated therein, and especially on the ground of error in the charge of the court to the jury. The motion for a new trial was overruled, and the defendant excepted. The court charged the jury, amongst other things, as follows:

"The construction of a written instrument, or a will, is a question of law to be determined by the court. Looking to the entire will of the late Barton Thrasher, the intention of the testator, if that intention can be ascertained, should govern, and it is the duty of courts and juries, when that intention is ascertained, to carry into effect that intention. The leading scheme or intention of this testator is equality among his descendants, as derived from his will.

"By the second item of the last will and testament of Barton Thrasher, deceased, after declaring that he had by deed conveyed to E. W. Thrasher, defendant, certain lands at a certain valuation fixed by him, and which he declared was an advancement, and to be accounted for by him, and declaring that he had a note for \$25,300 00 against him, which he was to pay after his death, he further states that 'any note I may hold at my death against any of my legatees, bearing date at any time after the date of this will, or any receipt from any of them for any advancements out of my estate bearing date as last aforesaid, is to be counted against such legatee in the final division of my estate.' The court charges you, gentlemen of the jury, if you should conclude from the evidence that this receipt was executed by Barton Thrasher, deceased, in its present form, and for the amount of money expressed therein, to be applied as a credit on the notes held by said testator against said E. W. Thrasher, mentioned in his will, and said receipt was executed by Barton Thrasher to said E. W. Thrasher without the payment of any money by said E. W. Thrasher, and you should find the notes extinguished by

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said receipt, then the court charges you, that under said will, this is an advancement to said E. W. Thrasher by said Barton Thrasher, and said E. W. Thrasher should account for the same, as an advancement, to said estate, in the final division of said estate, and you should so decree."

The main question made on the trial of the case was whether the note of Early W. Thrasher for \$25,300 00, mentioned in the second item of the testator's will, was the property of the testator at the time of his death, and passed under the will to his legatees named therein, or whether the same was extinguished by the testator in his lifetime. If that debt was extinguished by the testator in his lifetime by the giving of the receipt to the defendant, then it constituted no part of the assets of his estate, and did not pass to his legatees, under the will, at the time of his death. The will of the testator did not take effect until his death, and the legatees under it took only such property as he had at the time of his death. There can be no doubt that it was the intention of the testator, as manifested by his will, that the legatees specified therein, to-wit: his children, and the representatives of his deceased children, should receive equal shares of his estate at his death, each one to be charged with the specific property he had received as directed by the will—not according to the general law of advancements when there is no will, but in the manner as specified in the will. The testator regulated that matter himself by his will, and did not leave it to be regulated by the general law applicable to advancements as in cases of intestacy, the object and intention of the testator being to make an equal division of such property as he might have at the time of his death amongst the legatees specified in his will, and in the manner therein specified.

The question arises, how much property did the testator have to be disposed of under his will at the time of his death, and of what did it consist? Was the \$25,300 00 note of Early W. Thrasher a part of the testator's estate at the time of his death? If it was a part of his estate at that time, then it passed to his legatees under the will; but if it was not

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a part of the testator's estate at the time of his death, the defendant was not bound to account for it to the legatees as a part of their respective legacies, or as an advancement, for if that specific debt due the testator became extinct during his life, and by his own act, it would be extremely difficult to perceive how an *extinct* debt could be considered as an advancement in payment of a legacy under this will. That the testator, when he executed his will in October, 1865, held and recognized the note due to him by his son, Early W. Thrasher, as a part of his estate which was to pass to his legatees under his will, is quite clear from the terms of it. But that specific debt due to him was his own property, he had dominion and control of it during his lifetime, and had the undoubted right to have burnt it or to have canceled it in any other manner; in other words, to have extinguished it; and when it became extinct by the act of the testator, it constituted no part of his estate to be accounted for under his will as an advancement or otherwise. Did the testator, in his lifetime, extinguish that debt due to him by the giving of the receipt of the 18th of April, 1867, set forth in the record? If the testator did execute that receipt in his lifetime, its legal effect was to extinguish the debt due by Early W. Thrasher to the testator, specified in the second item of the testator's will. It was in the nature of an ademption of that specific debt by the testator in his lifetime, a destruction of it, and there was no such debt in existence due the testator at the time of his death which could have passed under his will; there was no such debt due to the testator at the time of his death on which his will could operate. In the view which we have taken of this case, as presented by the record before us, it necessarily follows that the charge of the court to the jury was error. The effect of that charge was to exclude from the consideration of the jury the legal effect of the extinction of the note by the testator in his lifetime, and to make the defendant liable for the amount of the same if the note was extinguished, as an advancement; whereas, by the express terms of the testator's will, any note or receipt held by him,

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of any one of his legatees, bearing date at any time after the date of his will, for any advances made out of his estate, should be counted against such legatee on final settlement of his estate, and no others. It is not pretended that the testator took from Early W. Thrasher any receipt or other showing that the extinguished note was to be an advancement to him of that debt, as provided in his will. The fact that no receipt or other showing was taken by the testator from Early W. when he extinguished the note against him, is strong presumptive evidence that it was not intended as an advancement under the provisions of his will. An advancement is any provision by a parent made to and accepted by a child out of his estate, either in money or property, during his lifetime, over and above the obligation of the parent for maintenance and education. Donations from affection, and not made with a view of settlement, nor intended as advancements, shall not be accounted for as such: Code, section 2579.

There is nothing in the record before us which goes to show that the testator, when he extinguished the specific debt due to him by his son, Early W., intended it as a provision for him out of his estate, either under his will or otherwise, or that it was accepted as such by Early W., but on the contrary, as no receipt or other showing was taken by the testator from Early W., the presumption is that he was not to account for it as an advancement under the provisions of the testator's will. If the testator executed the receipt as set forth in the record, then the note for \$25,300 00 was extinguished by it, and it did not pass to the legatees under the testator's will. If the note for \$25,300 00 was not extinguished by the testator's receipt, as set forth in the record, then the note was a part of the testator's estate at the time of his death, and passed to his legatees under his will, and the question of advancement had nothing to do with it, for the simple reason that an *extinct* debt could not be counted as an advancement under the provisions of the testator's will, there being no evidence by receipt or otherwise, that the specific debt was extinguished for that purpose, or with that intention, and so accepted by the legatee,

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and this applies as well to the note for \$7,700 00, dated 20th July, 1866, as to the note for \$25,300 00, dated 15th September, 1864, the other note mentioned in the receipt bearing date prior to the execution of the testator's will.

Let the judgment of the court below be reversed.

JOHN A. HOWARD, plaintiff in error, vs. CLINTON C. DUNCAN, defendant in error.

Howard, under an agreement with Barrett, bought Barrett's land at sheriff's sale, paying about \$2,000 00, and agreed that Barrett might redeem it by paying him the money he had advanced. Barrett afterwards, with Howard's consent, sold the land to Allen for \$8,000 00, on time, Howard making to Allen a bond for titles and taking his note for that amount. A dispute having arisen between Barrett and Howard as to the final profit on this sale, it was found by arbitrators to belong to Barrett, whereupon Howard gave to Barrett two notes, one for \$100 00, and the others for the balance, to be paid when the notes of Allen were collected. The \$100 00 note was traded to the plaintiff, who knew all the facts, as stated. Afterwards Allen became insolvent, and with Barrett's consent, Howard took back the land and gave up Allen's notes. The plaintiff sued Howard on the \$100 00 note. It was in proof that Allen was insolvent, and that the land was not worth more than the \$2,000 00 originally paid by Howard, though Howard admitted Allen had let him have six light bales of cotton as rent at the rescission of the sale, but there was no proof of the value of the cotton. The court charged the jury that if the trade with Allen was canceled without the knowledge of the plaintiff, the jury should find in his favor:

Held, that this was error, unless qualified, as follows: Provided, the land and cotton were worth more than \$2,000 00, with interest till the cancellation, in which case the plaintiff would be entitled to the excess, up to the amount of his \$100 00 note, with interest.

Contracts. Sale. Rescission. Before Judge HILL. Houston Superior Court. May Adjourned Term, 1873.

Duncan brought complaint against Howard, on the following note:

"\$100 00. I promise to pay J. B. Barrett or bearer one hundred dollars, to be paid when I collect the money from

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sale of Howard Moore lot, sold to Major Allen. May 31st,
1870. (Signed) "J. A. HOWARD."

The defendant pleaded that the condition upon which payment was to be made had not accrued.

The evidence made, in substance, the following case: At a sheriff's sale of land belonging to Barrett, the payee of the note, the defendant, at the request of Barrett, purchased the same for \$2050 00, with the understanding that he should reconvey said property when repaid the purchase money with interest thereon. Barrett, being unable to refund said money, bargained the land to a person of color named Major Allen, for \$3,000 00, on one and two years' time. Howard executed his bond for titles to Allen, taking his (Allen's) notes. A controversy then arose as to whom the profit on the land trade belonged, whether to Barrett or to defendant. This question was submitted to arbitration, in which proceeding the plaintiff appeared as counsel for Barrett. The arbitrators held that the profit aforesaid belonged to Barrett, and directed that defendant should make and deliver his note to Barrett for the same, conditioned to be paid when Allen should take up his notes. Defendant gave two notes to cover said profit, one for \$100 00, and the other for the balance, each with the condition hereinbefore referred to therein expressed. The \$100 00 note was transferred to plaintiff in consideration of professional services rendered. Allen became insolvent, and being unable to pay for the land, at the request of and with the consent of Barrett, delivered up his bond and received his notes. He also delivered to defendant six light bales of cotton for rent. The land was not worth more than the amount originally paid for it by the defendant. There was no proof of the value of the cotton.

The court charged the jury "that if they believed the plaintiff received the note from Barrett in payment of a debt which Barrett owed him, and the defendant knew this and assented to it, and afterwards canceled the trade with Major Allen without the knowledge or consent of the plaintiff, and

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took the land back, giving up the notes for the purchase money without the consent of the plaintiff, they should find for the plaintiff, although they might be satisfied Major Allen was insolvent and unable to pay for the land, and that Barrett consented to the cancellation."

The jury found for the plaintiff. The defendant moved for a new trial because of error in the aforesaid charge. The motion was overruled, and defendant excepted.

WARREN & GRICE, for plaintiff in error.

S. D. KILLEN ; DUNCAN & MILLER, for defendant.

McCAY, Judge.

Without going over the facts of this case, we are of the opinion that the judge erred in his charge to the jury, in saying to them that if Howard recanted the land trade with Allen without the consent of the plaintiff they ought to find for the plaintiff. We recognize the right of the plaintiff to sue without showing that Howard had collected the money from Allen. By taking back the land he made it impossible for the plaintiff to show that such money was collected. But on considering all the evidence, we think the right of the plaintiff to recover depends upon whether in fact Howard has got back his money with interest. Barrett, under no view of the case, was entitled to any profit, if none was made. The plaintiff took the note with a full knowledge of all the facts, and he ought to have no more rights than Barrett would have had, had he not consented to the rescission. Clearly, as it seems to us, that would be nothing if at last Howard, without fault of his own, has only got his money back. The proof was that Allen was insolvent, and that the land was worth no more than Howard's original advance. What the six bales of cotton were worth does not appear, but if the whole would not more than repay Howard for his advance and interest, we think that even as against Duncan he can hold that. Duncan had full notice and must stand in Barrett's shoes. If the land

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and cotton will more than repay Howard principal and interest, then Duncan is entitled to the excess up to the amount of this note and interest. That is the true equity between the parties under the facts as proven; and that, we think, ought to have been the charge of the judge.

Judgment reversed.

THE CENTRAL RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* BURR & FLANDERS *et al.*, defendants in error.

The chancellor did not abuse his discretion in granting the injunction in this case.

Injunction. Sale. Receiver. Before Judge HILL. Bibb county. At Chambers. December 6th, 1873.

For the facts of this case, see the decision.

TRIPPE, Judge.

Burr & Flanders, owners of a flouring mill, executed an instrument in writing to the Central Railroad and Banking Company acknowledging the receipt of eight hundred and twenty-five barrels of flour, for sale for and on account of said Central Railroad and Banking Company, and the proceeds of sale to be accounted for to said company to the extent of all freight due—to-wit: \$8,233 74—and therein acknowledged themselves as bailees of said railroad company, for said flour, and agreed to pay over the proceeds of sale as fast as realized, or redeliver the flour to the company on demand, in case of failure to make payment of the proceeds. The flour was described as being so many barrels of three different brands, with an equal number of each brand, but was not otherwise designated or severed from other flour of the same brands in the same mill, and in possession of Burr & Flanders. In a few weeks thereafter, Burr & Flanders becoming insolvent,

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a creditors' bill was filed, and an *ad interim* order was granted restraining them from disposing of their assets, and appointing an *ad interim* receiver.

The Central Railroad and Banking Company had, on the same day this order was granted, commenced an action of trover and bail against Burr & Flanders for the flour. The company was made a party defendant to the bill, with a prayer for an injunction against the action of trover. At the hearing for an injunction until the final trial, and for the appointment of a permanent receiver, the prayer for each was granted, the chancellor refusing to grant an order on the motion of the company, to permit it to take the eight hundred and twenty-five barrels and give bond for the same :

Held, that there was no such identification and severance of any particular eight hundred and twenty-five barrels of flour from the general lot, so as to entitle the railroad company to the possession thereof, under the facts of the case ; and as the rights and equities of all the creditors can be adjusted at the final hearing, or upon the trial of any issue that may be made under section 4201 of the Code, we do not think the chancellor abused his discretion in granting the injunction.

Judgment affirmed.

AMOS BROWN, plaintiff in error, *vs.* SIMEON N. BROWN, executor, defendant in error.

When the questions made by the bill of exceptions have been before decided by this court adverse to the plaintiff in error, damages will be awarded.

Damages. Practice in the Supreme Court. Before the Supreme Court. January term, 1874.

For the facts of this case, see the decision.

BILLUPS & BROBSTON, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

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WARNER, Chief Justice.

The only question made on the argument of this case was whether damages should be awarded against the plaintiff in error for bringing the case up to this court for delay. The relief pleas which the plaintiff in error had filed in the court below, and which were overruled by the court, had been decided by this court in accordance with that ruling, and it is therefore apparent that the case must have been brought here for delay only.

Let the judgment of the court below be affirmed, and ten per cent. damages awarded, as provided by the 4286th section of the Code.

WILLIAM W. GARRARD, executor, plaintiff in error, *vs.* COLUMBUS C. CODY, defendant in error.

The eighth section of the limitation act of 1869, providing that "all cases of the character mentioned in any section of this act, which have arisen, or in which the right of action or liability has accrued, or the contract has been made, since the 1st day of June, 1865, shall be controlled and governed by the limitation laws as set forth in the Code," does not apply to the right of a plaintiff in execution to levy upon land belonging to the defendant at the date of the judgment, and which he has sold to a third person, who has gone into possession of the same. In such cases, as was decided by a majority of this court in the case of *Akin vs. Freeman*, the obligation of the plaintiff to proceed within four years was suspended by the various acts suspending the statutes of limitation up to the 21st of July, 1868, and there is nothing in the act of 1869, in any of its sections, applying to this right of the plaintiff, or altering this effect of said suspending acts.

Statute of limitations. Executions. Before Judge JAMES JOHNSON. Muscogee Superior Court. April Term, 1873.

On September 11th, 1866, Columbus C. Cody recovered a judgment against John R. Ivey for \$2,126 72, besides interest and cost. An appeal was entered by the defendant. Upon

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the second trial, which was had on February 8th, 1867, a judgment for the same amount was recovered against said Ivey and Samuel B. Cleghorn, security on appeal. The execution based on this judgment was levied on March 4th, 1872, upon certain property situated in the city of Columbus, which was claimed by William U. Garrard, as executor of W. W. Garrard, deceased. Upon the trial of the issue thus formed, it appeared that Garrard, as executor, purchased said property from Ivey on January 26th, 1867; that he knew of the first judgment, but was assured by Ivey that it was obtained when he was out of the state, and that his testimony would produce a different result on the appeal trial; that Garrard, executor, paid a full consideration for said property, and had been in possession thereof since the date of his purchase.

The court charged the jury as follows: "If they believed that the claimant bought the premises levied on from the defendant, John R. Ivey, after the first verdict, and went into possession of the premises four years prior to the levy, and was a *bona fide* purchaser, and a *bona fide* purchaser was one who bought, intending to buy, and pays a fair price for the property, and buys with no intention to hinder or delay creditors, then the claimant holds the premises discharged from the lien of the plaintiff's judgment, notwithstanding the evidence introduced in this case."

The jury found the property not subject. The plaintiff in execution moved for a new trial on account of error in the aforesaid charge. The motion was sustained, and claimant excepted.

R. J. MOSES, for plaintiff in error.

PEABODY & BRANNON, for defendant.

MCCAY, Judge.

Assuming, as I must do, (though I did not agree to it,) that the decision of this court in *Akin vs. Freeman*, 48 Georgia, is correct, we are constrained to affirm the decision of Judge Johnson in holding that he erred in his ruling at the trial in

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this case. It is true that this right to levy on the land in the possession of the claimant is a right acquired since June, 1865, and is to be controlled by the laws operating upon rights so accruing; we are, nevertheless, clear that, under those laws, the plaintiff had not lost his lien at the time of the levy. Assuming that section 2583 of the Code is a statute of limitations, (and that is the ruling in *Akin vs. Freeman*,) it was, by the ordinance of 1865, suspended until the full establishment of civil government. This did not take place, as we have uniformly held, until the 21st of July, 1868. The only question left is whether the eighth section of the limitation act of 1869, putting all cases arising under any of the sections of that act, when the liability, etc., has accrued since June, 1865, under the limitation laws of the Code, covers the right of a plaintiff in *f. fa.* to follow the land subject to his judgment into the hands of *bona fide* purchasers.

After a careful consideration of this act of 1869, we are clear that none of its sections refer to this right of the plaintiff or this liability of the land to be levied upon. They all refer to *suits on debts* not already in judgment. They all refer to *actions*, and specify in detail the causes of action to which they refer. In only one section is the case of judgments mentioned, and that case covers only suits upon judgments and *sci. fas.* to revive judgments. It would be making law to construe this as covering the case of a levy of a judgment. Such a construction would, too, as we think, be contrary to the clear policy of the legislature, so often displayed since the war, of alleviating as much as possible the pressure of old debts and judgments against the debtor class. The effect, if this had been the legislative intent, would have been to force a levy of all judgments and a forced sale of property by the 1st of January, 1870, and would have filled the land with sheriffs' sales, and brought sad distress upon the very class alluded to, a class which has received, and justly, a most kind consideration from all men, in view of the sad results of the war and subsequent events.

Judgment affirmed.

Cherry *vs.* Smith.

•WILLIAM C. CHERRY, plaintiff in error, *vs.* WILLIAM T. SMITH, defendant in error.

A submission by parties litigant of the matters in suit to seven arbitrators to be afterwards chosen by one of the parties, though an order of the court be also taken to that effect, is not a statutory submission, and may be revoked before an award is made.

Arbitrament and award. Revocation. Before Judge JAMES JOHNSON. Harris Superior Court. October Term, 1873.

There were three cases pending in Harris superior court between the above parties. On April 16th, 1873, by written agreement, they submitted the matters in controversy to the arbitrament of seven persons to be selected by William C. Cherry. An order of the court was taken in accordance with said submission. Seven arbitrators were selected, who made an award. Upon motion being made to make the award the judgment of the court, it was objected by Smith that he had revoked his assent to said arbitrament before the submission was delivered to the arbitrators. The court sustained the objection, and Cherry excepted.

JAMES M. MOBLEY; CHARLES H. WILLIAMS; R. A. RUSSELL, by JAMES M. RUSSELL, for plaintiff in error.

L. L. STANFORD, for defendant.

TRIPPE, Judge.

The agreement or submission, if indeed it was a submission at all, was as follows:

“STATE OF GEORGIA—HARRIS COUNTY.

“Whereas, there exists between the undersigned a matter of controversy arising out of a mill business lately carried on under the name of W. C. Cherry, in Harris county, in which controversy both of the undersigned claim the indebtedness of the other, and also arising out of said controversy three suits now filed in Harris superior court, to-wit: one of W. C.

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Cherry *vs.* William Smith, another *vs.* William Smith, and one of William Smith *vs.* W. C. Cherry, all of said suits being now in suit in said court, and arising out of said mill business. And whereas, the undersigned prefer to submit said matter of controversy to arbitrament of arbitrators rather than said suits may continue in court, and have therefore determined to submit the same to the judgment and award of seven persons, who are to reside in Harris county, and to be chosen by said W. C. Cherry, and must meet at such time and place as the arbitrators may select. This April 16th, 1873.

“W. C. CHERRY,
“WILLIAM T. SMITH,
“N. VAROMAN,
“Z. C. McLEROY.”

- An order of the court was taken, reciting that the parties having signed a submission leaving the arbitrators to be selected by William C. Cherry, it is ordered that the said matters be referred to and submitted to said persons to be selected by W. C. Cherry.

There is nothing showing the selection of the seven arbitrators by any one. Seven persons met on the 17th June, 1873, and took an oath, reciting that whereas said matters had been referred to them at the April court of Harris county, they would impartially determine the same, etc. Then comes the award, signed by said seven persons, stating in the award that said Smith notified them that he would not appear before them, but withdrew from the arbitration. When the motion was made to make the award the judgment of the court, the objection was offered that Smith revoked his assent to submit the matters in controversy to arbitration, and did so before the submission was given to the arbitrators. Evidence was introduced on this point, and the court, holding that the objection was proven, refused the motion. We think the court was right. It was not a statutory submission, and was revocable: *Davis vs. Maxwell*, 27 Georgia 368; Russ. on Arbitration, 147. See *Crane, administrator, vs. Barry*, 47 Georgia,

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476, as to the right of a party to have an award made the judgment of the court. The order of the court referring the matters in controversy to such arbitrators as might be chosen by Cherry, one of the parties, under the submission, did not affect the right of Smith to revoke. What might be the effect of a rule of court taken by consent of parties submitting such matters as are in controversy in court to referees specified in the order, is one thing; an order that they be referred to persons to be selected by the parties, or by one of the parties under an agreement between them, is another and a different question. If the right of revocation existed before the order was taken, it was not taken away by an order containing the terms that this did. There is strong authority for the position that an agreement to submit to arbitration when an order of court is taken accordingly and in the usual terms, may still be revoked, and the remedy is an action for damages against the revoking party, or he may be punished for a contempt. We do not say what the remedy would be in this case, but we do not think that under the facts of this case there was error in the court's refusing to make the award the judgment of the court.

Judgment affirmed.

L. RICARD COLLINI, plaintiff in error, *vs.* JOHN NICOLSON, defendant in error.

(McCAY, J., was previdentially prevented from presiding in this case.)

1. A mechanic has a lien for the necessary materials furnished in order to comply with his contract, where his services were necessary to fit and put them up, though the articles may have been purchased by him.
2. A bill of particulars need not accompany the affidavit foreclosing a mechanic's lien.

Mechanics' lien. Before Judge SCHLEY. Chatham Superior Court. May Term, 1873.

For the facts of this case, see the decision.

Collini *vs.* Nicolson.

CHARLES N. WEST, for plaintiff in error.

RUFUS E. LESTER, for defendant.

WARNER, Chief Justice.

This was a proceeding to enforce a mechanic's lien for labor performed and materials furnished, under the provisions of the act of 1869. The defendant filed a counter-affidavit, and the issue thus formed was tried in the court below. On that trial the jury, under the charge of the court, found a verdict in favor of the plaintiff for the sum of \$771 99. A motion was made by the defendant for a new trial on the several grounds set forth therein, which was overruled by the court, and the defendant excepted.

1. The main ground of error complained of here, is to the charge of the court as to the plaintiff's lien as a mechanic, for the materials furnished by him as set forth in the record. It appears from the evidence that the plaintiff is a mechanic, that the defendant employed him as such to fit up his restaurant in the city of Savannah, and that he did so and furnished the materials for that purpose, to-wit: one nine-foot carving table, one seven-foot range, one broiler, one water fount and pipe, iron bars for broiler, two hundred and ninety-one pounds copper pans, frying pans and omelet pans, four two-light chandeliers, one four-light chandelier, four three-light chandeliers, two two-light chandeliers, twenty globes for chandeliers, one two-light pendant, back room chandelier. The plaintiff purchased these several articles, did not make them; but it required a mechanic to put up and fit together the aforesaid articles, to-wit: table, chandeliers, etc. The argument for the defendant is, that as to these several articles furnished by the plaintiff in fitting up the defendant's restaurant, he is a vendor of them to the defendant, and has no lien as a mechanic for the price thereof as for materials furnished under the statute. The court charged the jury, "that if they found from the evidence that the plaintiff, as a mechanic, en-

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tered into a contract with the defendant to fit up his restaurant, and did, in the capacity of a mechanic, furnish the articles specified in the plaintiff's bill, and did the labor and charged for them in the performance of said contract, then the plaintiff had a lien upon the property of defendant to the amount of said bill for said articles and labor, even though the plaintiff had bought the articles which he so furnished." The plaintiff was employed as a mechanic by the defendant, to fit up his restaurant, to enable him to do the business of a restaurant keeper therein, and to furnish the proper and necessary materials for that purpose. It required, according to the evidence, a mechanic to put up and fit together the articles referred to, for the use intended. The *necessary* materials furnished by the plaintiff, as a mechanic, under his contract with the defendant to fit up his restaurant, gave him a lien therefor, under the provisions of the act of 1869. "Mechanics shall have liens upon the property of their employers for labor performed and for materials furnished," are the words of the act. The plaintiff performed the labor as a mechanic, in fitting up the defendant's restaurant, and furnished the materials for that purpose under his contract with him. Were the materials furnished by the plaintiff, contained in the bill of particulars, *necessary* to complete the job in connection with the plaintiff's labor? The defendant's restaurant could not well have been fitted up for the use intended without the materials furnished by the plaintiff specified in the bill of particulars, and his labor performed thereon in fitting up the same for the use of the defendant, and it is not pretended that the materials so furnished by the plaintiff, were not necessary for that purpose. In our judgment there was no error in the charge of the court to the jury, in view of the evidence contained in the record.

2. The Code, which provides for the enforcement of mechanics' liens, does not require that a bill of particulars for the labor performed and materials furnished should accompany the affidavit of foreclosure, and therefore there was no error in the refusal of the court to dismiss the proceeding for the want of

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such bill of particulars, though we think it would be a good practice to do so; but we are not legislators to make the laws, our duty is to interpret and enforce them.

Let the judgment of the court below be affirmed.

JANE A. DUMAS, plaintiff in error, *vs.* JOHN NEAL *et al.*, defendants in error.

It was no abuse of the discretion of the court to refuse the injunction in this case, or to hold up a larger amount of money than he did.

Injunction. Before Judge HALL. Monroe county. At Chambers. February 26th, 1874.

Jane A. Dumas filed her bill against John Neal and the sheriff of Monroe county, making, in brief, this case:

Complainant, upon her marriage with her husband, James H. Dumas, entered into a marriage contract, by which she secured to her separate use all property she then had or which she might thereafter acquire, he receiving said property simply as trustee. This instrument was properly recorded. The marriage was solemnized in January, 1862. Her husband, within a short time thereafter, received into his possession, as such trustee, two slaves, of the annual value for hire of \$200 00. These slaves he controlled, and received the hire thereof, until they were emancipated in 1865. He received, also, a legacy of \$400 00, bequeathed to her by her uncle, Thomas J. Mann.

In the year 1865, her said husband, desiring to have the aid of complainant in keeping a boarding-house in the town of Forsyth, contracted that if she would give her personal services to such business, he would pay to her one-half the proceeds of this business. In pursuance of said agreement, during the years 1865, 1866, 1867, and up to the death of her said husband, which occurred in the spring of 1868, she gave her attention to such business, and in most instances he paid

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over to her the amount due under their contract, amounting to between \$200 00 and \$400 00 per annum, as a part of her separate estate. She would then lend to him these various amounts. There is due to her on this account \$1,000 00.

These various amounts, due to her from the estate of her deceased trustee, occupy the position of a preferred debt. Her said husband died insolvent. His largest creditor is John Neal, who holds a judgment against him as security for Allen Cochran for about \$12,000 00, obtained at the November term, 1861, of Monroe superior court. There has been no administration upon Dumas' estate. Complainant, on account of her poverty, ignorance of business, and inability to give bond, has failed to take out letters. She has had assigned to her dower and twelve months' support. Neal has recently levied upon the only real estate left by her husband, beyond that assigned to her, upon which she claims the first lien for the payment of her preferred debt. Neal's execution is proceeding illegally, for the reason that there is an entry of a levy on fifty-three bales of cotton, of date October 23d, 1865. This levy is entered dismissed on November 13th, 1865, by order of plaintiff's attorney. On the day of its dismissal there is entered a second levy upon the same amount of cotton, which is still undisposed of. This cotton was levied on as the property of Allen Cochran, the principal. Complainant therefore claims that, by reason of said dismissal said execution is satisfied, and at least said security discharged; also, that there cannot be a legal levy upon said land until some disposition is made of the last levy on the cotton. There being no administration upon her husband's estate, there is no one to set up this illegality. She has notified the ordinary of the necessity of an administration, and has demanded the appointment of the clerk of the superior court.

Prays that a sale under said levy may be enjoined; that complainant's claim may be decreed to be a preferred debt against the estate of her deceased husband, and that the writ of subpoena may issue.

Neal answered, in substance, as follows: Knows nothing

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about the ante-nuptial contract mentioned, or about the marriage. Knows nothing as to said negro slaves and their hire, who was chargeable with same, or the amount; has no doubt that the hire was used by way of service. Has no knowledge of the kind of property, if any, or by whom received, from complainant's mother or Thomas J. Mann, or the value of said property. Defendant has no knowledge of the contract set out in complainant's bill as to work and labor of complainant. Having been a creditor long before said contract, he insists that Dumas could not make a voluntary gift to the use of himself and family, and thus encumber his estate with preferred claims, to the ruin and defeat of creditors. Knows nothing of the labor and service she performed, and if performed, it was such as was due by a wife. He believes she was, before her husband's death, a helpless invalid, and large amounts of labor, money and service were bestowed upon her by said Dumas. Has heard that complainant received the negro hire and appropriated it as she chose. Has been informed, as to hiring of complainant, that said Dumas promised his wife and daughter, if they would undertake this increased labor, he would be able to dress them better than he otherwise would. As to the proceeds of said boarding amounting to \$1,000 00, this defendant does not believe any such thing. The dower and twelve months' support of complainant and children have absorbed all of the estate except the lands levied on. Defendant has been informed, and believes, that complainant has received the rent of the estate since the death of Dumas, of the annual value of \$250 00, and for which she is bound as executrix in her own wrong, and asks that she may account on the hearing of this bill. The whole amount of his *fi. fa.* is due and unpaid. Has tried for years to make money out of Cochran's estate, at great expense, and has failed to do so. Admits levy on fifty-three bales of cotton. It was claimed by one Patten, and levy was dismissed by defendant's attorney for some defect in the papers, and was re-levied on the same day, on the same cotton, which is now claimed as not subject to said *fi. fa.* The cotton has long since been sold,

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and the proceeds are now in the hands of a receiver, subject to the priorities which may finally be established. Defendant has no hope of ever realizing one cent from said fund.

Affidavits were read on the hearing of the motion for injunction, in support of the bill and answer respectively.

It appeared that James H. Dumas, as trustee for his wife, received of A. V. Mann, as administrator of Thomas J. Mann, \$330 98, on March 5th, 1864.

The chancellor directed that the sheriff should proceed to sell the property levied on, and out of the proceeds deposit \$400 00 in the office of the clerk of the superior court of Monroe county to cover the preferred claim of complainant.

To this order complainant excepted.

SPEER & STEWART, for plaintiff in error.

PEEPLES & HOWELL; CABANISS & TURNER, for defendants.

MCCAY, Judge.

There was no reason for an injunction. The complainant, at best, had only a claim upon the fund the property might raise. We think, too, the court has held up enough of the fund. The use of the negroes by the family furnishes no fair ground of a charge against the husband. As to the claim for services, we think it is pushing the separate right of the wife very far. It was her duty to her husband, whilst she lived with him, to do these very things; she is not to be a drone in the hive. Our laws go very far in protecting the property of the wife against the husband's debts and extravagances. But the view taken by the plaintiff in error makes the husband the slave to work and provide for the wife, and she to set up and enjoy herself. Such claims come up very suspiciously, and may fairly be treated as frauds upon creditors. We think, too, her use of the property other than the dower or homestead, is a fair offset to her claims for labor. True, she got it under the judgment of the ordinary, but that judgment,

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as the federal court has held, was void as against this debt. We will not disturb the decision of the chancellor. He did not abuse his discretion.

Judgment affirmed.

ELBERT MARTIN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When a jury, on the trial of a criminal case, have retired to consider of the verdict, and have been called back by the court to be recharged, it is the right of the defendant to have his counsel present, and he does not lose this privilege unless by a clear and distinct waiver thereof.

Criminal law. Jury. Practice in the Superior Court. Before Judge HILL. Bibb Superior Court. April Term, 1873.

Martin was placed on trial for the offense of simple larceny. He pleaded not guilty. The jury found to the contrary. He moved for a new trial upon the following, among other grounds :

"Because the court erred in recalling the jury from their room, after they had been charged with the case, and after they had been out over two hours considering their verdict, and giving them a second charge in the absence of defendant's counsel and without his consent, and by this second charge may have caused the conviction of the accused."

The presiding judge refused to certify the ground aforesaid for the reason that he understood the solicitor general to say that counsel for the defendant had waived everything, or he would not have recalled and recharged the jury.

The solicitor general stated that when counsel for defendant was about to leave the court-room, while the jury were out, he understood him to say that he waived everything.

Counsel for defendant stated that he only waived the polling of the jury and the reception of the verdict in his absence.

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The court required counsel for defendant to strike the aforesaid ground from the motion, to which defendant excepted.

The motion for a new trial was overruled, and defendant excepted.

The judge certifies that counsel for defendant was absent from the court-room at the time the jury was recharged without leave.

LYON & IRVIN, for plaintiff in error.

CHARLES J. HARRIS, solicitor general, by JOHN Rutherford, for the state.

TRIPPE, Judge.

It is true the court required the prisoner's counsel to strike from his motion for a new trial the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to-wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was "the polling of the jury and the reception of the verdict in his absence." There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during one of the most important portions of his trial, the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply grafted in our practice has this great right become that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary com-

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pensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial.

It is said that under the rule we hold in this case, courts might be embarrassed in the administration of justice, that cases could not be conducted with certainty to a conclusion if counsel for a prisoner could stop the trial by wilfully absenting himself from the court-house. To this objection it may be replied that courts are armed with plenary authority to enforce the discharge of duty on the part of all their officers. And, besides, a fitting and proper penalty on derelict counsel in the case supposed, they could, in cases when the necessity arose, require the defendant to procure other counsel, or make the appointment for him. If the absence of counsel resulted from a cause which would be a good ground for continuance, and it would not be proper to substitute other counsel, it were better that there should be a continuance, or at least a temporary postponement, than that one not skilled in the law, and who was largely ignorant of his legal rights, and perhaps totally ignorant of the practice on which those rights rested, should lose a privilege, the value of which cannot be estimated, and which the organic law says shall not be taken from him. So, in this case, it would not probably have taken much time, possibly a few minutes, to have secured the attendance of defendant's counsel, or had that been impossible, other counsel might have been chosen by the defendant or appointed by the court. An effort in that direction would have been proper. As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the state's counsel, at least it is positively so stated by defendant's counsel, and doubtless the court was misled by it, we think that there should be a new trial.

Judgment reversed.

Smith vs. Ezell.

HENRY T. SMITH, agent, plaintiff in error, *vs.* BRAXTON EZELL, defendant in error.

Possession under an order setting apart a homestead to the wife of the defendant in execution, cannot be tacked to subsequent possessions to protect the purchaser under section 3583 of the Code, from the seizure of said homestead under an execution based on a debt contracted prior to the adoption of the Constitution of 1868.

Homestead. Judgments. Prescription. Statute of limitations. Possession. Before AUGUSTUS REESE, Esq., Jndge *pro hac vice*. Jasper Superior Court. August Term, 1873.

This case is fully reported in the decision.

C. F. AKERS, for plaintiff in error.

KEY & PRESTON, for defendant.

WARNER, Chief Justice.

In September, 1866, the plaintiff obtained a judgment against E. T. White, and execution issued thereon. In 1869 the wife of White, the defendant in execution, obtained a homestead for the benefit of herself and children on the property of her husband, and continued in possession of the same until May, 1870, when the homestead was exchanged with Battie for a lot in the city of Atlanta, with the approval of the ordinary, which was valued at \$2,000 00. Battie remained in possession of the homestead land until March, 1871, and then sold it to Smith, as agent for his wife, for \$2,000 00, who went into the possession of it. Both Battie and Smith purchased the homestead in good faith, paid full value therefor, believing they were getting a good title. The execution against White was levied on the land set apart as a homestead, as his property, and claimed by Smith, as agent for his wife. On the trial of the claim the claimant sought to protect her possession as a *bona fide* purchaser for a valuable consideration under the provisions of the 3583d section

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of the Code. In order to make out the four years' possession of herself, and those under whom she claimed, it became necessary to count the time Mrs. White, the wife of the defendant in execution, was in possession of the homestead. The court held and decided that the time of her possession could not be counted, and the claimant excepted. We find no error in the ruling of the court. Mrs. White was not in possession of the homestead as a *bona fide* purchaser for a valuable consideration within the meaning of the section of the Code before cited, if indeed she was in possession of any homestead at all, as against debts contracted prior to the adoption of the constitution of 1868.

Let the judgment of the court below be affirmed.

Ex parte GRANVILLE C. CONNER, plaintiff in error.

1. Under article 8, section 4, paragraph 5, of the constitution of this state, which declares that "no law shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof," it is not competent for the general assembly to enact a law incorporating three separate and distinct corporations, or reviving by name three charters which had become obsolete.
2. Where a person summoned as a juror claims exemption from such duty under an act of the general assembly, the decision of the court refusing such right is one to which a writ of error will lie. Though such person may have served his time as a juror, yet his name is still in the jury box; and, in addition to this, the decision affects the administration of public justice. See end of report, (R.)

Constitutional law. Laws. Corporations. Bill of exceptions. Practice in the Supreme Court. Before Judge HILL. Bibb Superior Court. October Term, 1873.

The plaintiff in error having been drawn and summoned to serve upon the traverse jury in Bibb superior court, at April term, 1873, made application to be discharged, upon the ground that he was a member of the Macon Volunteers, a military company, the members of which were exempt from

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such service, and which had filed in the office of the clerk of the superior court of said county, a certificate specifying the names of the members, as provided by law, the name of the movant appearing thereon as first sergeant of said company.

It appeared that by the original charter of the Macon Volunteers, approved December 7th, 1841, the members of said company were exempted from jury duty. That said act was re-enacted on February 20th, 1873, as follows :

“AN ACT to re-enact and declare of full force an act entitled ‘An act to incorporate the volunteer corps of infantry in the city of Macon, and to grant certain privileges to the same,’ approved December 7th, 1841; and to extend the provisions of said act to the Floyd Rifles, of the city of Macon, and the Clinch Rifles and Irish Volunteers, of the city of Augusta.’

“SECTION I. *The General Assembly of the State of Georgia do enact*, That the above recited act is hereby re enacted and declared to be of full force and validity, and that all the powers, privileges, franchises and immunities therein granted to the Macon Volunteers be, and they are hereby renewed and confirmed unto the said Macon Volunteers and Floyd Rifles, of the city of Macon, and the Clinch Rifles and Irish Volunteers, of the city of Augusta.’

“Section II. repeals conflicting laws.”

The application was refused and Conner excepted.

When this case was called, a motion was made by counsel for the State of Georgia to dismiss the writ of error upon the ground that a reversal would not benefit the plaintiff in error, as he had already served his time as a juror. The motion was overruled, the court enunciating the principle embraced in the second head-note.

G. W. GUSTIN, for plaintiff in error.

N. J. HAMMOND, attorney general; R. W. JEMISON, solicitor general *pro tem.*, by JOHN RUTHERFORD, for the state.

McCAY, Judge.

1. The privilege claimed by Mr. Conner is dependent on a special grant, an exemption from a public duty cast by law on citizens in general of his class, and his right to the exemption should be clearly made out, under strict rules of construction. Much might be said under such a rule against his right, even assuming the validity of the law under which he claims. At best the exemption only arises by inference and implication and not by direct grant, and under the rules for construing special laws granting special exemptions, it might well be denied. Again, the ordinary, and not the clerk of the superior court, is the successor of the clerk of the inferior court in matters pertaining to county affairs, and this particular matter—the exemption of one from jury duty, would seem to belong to the office where the books and names from which the list is made up, the tax books, are kept. But we affirm the judgment, on the ground that the act of reincorporation under which the right is claimed is in violation of article 3, section 4, paragraph 5 of the constitution. That paragraph declares that no act shall pass having more than one subject matter. This act has for its avowed purpose the creation of three separate corporate bodies, and, as we think, comes exactly within the intent and scope of this prohibition. The evident intent was to prevent what is commonly known as "log rolling," passing through a measure not on its own merits, by combining it with other measures, each of which has a certain strength, and thus pulling them through by virtue of their combined strength. This bill is, too, one for private benefit, and makes just the case provided for. If such a bill as this is not obnoxious to the rule, it will be difficult to find one. A fertile imagination can always get up some sort of a thread that will connect ideas however incongruous. The thread suggested here is that these companies have a common purpose. But that is true of two railroads or two banks. We are inclined to think, too, that the title of the act does not bring this exemption within its scope. There is a wide

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distinction between a charter of a corporation and an exemption from public duty in a charter. The legislature might well grant the one and refuse the other. The title here indicates that a certain charter is to be revived. Is there anything in this to indicate that a certain exemption of its members from jury duty is also to be granted?

2. As appears, this exemption was the whole object of the law, and the revival of the charter was a mere device to get the exemption passed. We suppose this was a deliberate scheme, by this very misnomer, to get through the legislature an exemption which would not have been granted had the real intent been apparent. Such devices are very reprehensible, and so far as it is in our power, we feel disposed to apply, for the purpose of stopping them, the constitutional prohibition in its plain and obvious meaning.

Judgment affirmed.

JOHN CUNNINGHAM, assignee, plaintiff in error, vs. ALBERT R. LAMAR, defendant in error.

(McCAY, J., was providentially prevented from presiding in this case.)

Where a plaintiff, who sues out a summons of garnishment, signs the partnership name of which he is a member, as surety to the bond required by law, and his partner is present consenting thereto, and afterwards comes into court and ratifies the same under seal, and proposes to substitute his signature for that of the firm:

Held, that the amendment to the bond should have been allowed, and whilst we are strongly inclined to the opinion that the bond was binding on the partner individually who thus consented to the signing, we are satisfied it was error to refuse the amendment and to dismiss the garnishment.

Garnishment. Amendment. Partnership. Before Judge CHISOLM. City Court of Savannah. July Term, 1873.

Process of garnishment issued on a suit in favor of Cunningham, assignee, against Albert R. Lamar, and was served

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upon Beard & Kimball. The garnishees answered, denying indebtedness, etc. The answer was traversed. Judgment was obtained against the defendant. Upon the trial of the aforesaid traverse, counsel for defendant moved to dismiss the garnishment proceedings because the bond was signed by Cunningham, as assignee, as principal, and by him, in the name of the firm of Claghorn & Cunningham, as security, said firm being composed of said Cunningham and one Joseph S. Claghorn.

Counsel for plaintiff proposed to amend said bond by giving other and additional security. This the court refused to permit, and plaintiff excepted.

Counsel for plaintiff then filed an instrument executed by said Claghorn, to the effect that the signature by said Cunningham of the firm name of Claghorn & Cunningham to said garnishment bond, was made with his full knowledge and consent at the date of its signing, and that he ratified and confirmed the action of said Cunningham in the premises.

The court, nevertheless, dismissed said garnishment proceedings, and plaintiff excepted. Error is assigned upon each of the aforesaid grounds of exception.

HENRY B. TOMPKINS, for plaintiff in error.

JULIAN HARTRIDGE, for defendant.

TRIPPE, Judge.

There can be no doubt that one partner cannot, of his own authority, bind the partnership by signing the firm name to a bond which is necessary in suing out a legal process for himself in some individual suit of his own, nor indeed in actions in favor of any persons except the firm. Where it is in behalf of the firm, special power so to sign is given by the Code. And without the proof offered in this case, the garnishment bond would have been a nullity in so far as it wanted security. It is claimed by defendant in error that although Claghorn, the other party, authorized and consented for his co-

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.partner to sign the firm name, yet, as the instrument executed was under seal, the authority must also have been under seal. It cannot be denied that this was, as a general rule, the doctrine of the common law. But there are limitations and exceptions to it which largely modify its operation. There is another rule of the common law, as ancient as the other, which makes a deed executed by an agent in the presence of his principal the deed of the latter, although the authority to do it is merely by parol: Story on Agency, section 51; Gow on Partnership, 59. So, also, has it often been held, that if the deed be executed by one partner in the presence of and with the assent of all the partners, it shall be deemed the deed of all: Story on Partnership, section 120, and a large number of cases there cited sustaining the position. In *Ellis vs. Francis*, 9 Georgia, 325, it was held that a return of *nulla bona* on an execution made by a person other than the constable, but in his presence and by his request, he knowing it to be true, might "be considered as the act of the constable himself, as much so as if he had held the pen in his own hand." See also *Reinhart vs. Miller*, 22 Georgia, 415. Whilst we are then strongly inclined to the opinion that Mr. Claghorn was bound by the bond as it was executed, either individually or with the partnership of which he was a member, we are satisfied that it would have been proper to have allowed the amendment, and that it was error to dismiss the garnishment.

Judgment reversed.

CLAGHORN & CUNNINGHAM, plaintiffs in error, *vs.* **ROBERT SAUSSY**, defendant in error.

The monthly wages of a forwarding clerk in the employment of a railroad company, whose duty it is to attend daily to the forwarding of goods, to report in the morning when the drays commence work, and in the evening when the day's labors are over, the company reserving the right to discharge him at any time, are not subject to the process of garnishment.

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Garnishment. Before Judge CHISOLM. City Court of Savannah. May Term, 1873.

For the facts, see the decision.

HENRY B. TOMPKINS, for plaintiff in error.

J. R. SAUSSY, for defendant.

WARNER, Chief Justice.

The only question made in this case is, whether the garnishee was liable to be garnished for the wages of the defendant who was in its employment, on the statement of facts disclosed by the record. It appears therefrom that the debtor is in the employ of the Central Railroad and Banking Company as a forwarding clerk, for which he receives monthly wages; that it is his duty to report daily at seven o'clock A. M., when the drays commence work, and to attend to the forwarding of goods consigned to said company so long as the drays continue to work, and at the close of the day's work to report at the office of the company to assist in checking up and correcting any mistakes in the shipments or receipts by the drays during the day. The work is a regular routine, day by day, and not at intervals, and whilst the pay is monthly, the company has the right to discharge said employee at any time his services are not needed, usually giving a month's notice. As a clerk in the forwarding department his time is kept with the same regularity as that of any other employee or mechanic of said company. The 3554th section of the Code declares that "all journeymen, mechanics and day laborers, shall be exempt from the process and liabilities of garnishment on their daily, weekly or monthly wages, whether in the hands of their employers or others: provided, that the wages of no person in the employment of another shall be exempt from the process of garnishment when the consideration of the debt is for provisions for the use of the employee or his family, or when the consideration of the debt is for the board of himself or family." The object of this statute being for the benefit

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of the laboring class of small means, should be liberally construed so as to effect the intention of the legislature. The employee of the Central Railroad and Banking Company, in this case, comes within the reason, true intent and meaning of the act, in our judgment, and his wages were not liable to the process of garnishment. In the case of *Caraker vs. Mathews*, 25 *Georgia Reports*, 571, it was held that the wages of an overseer were not liable to process of garnishment. We can see no difference in principle, sound reason or public policy, between that case and the one now before us. The distinction sought to be made between this case and that of *Butler & Company vs. Clark*, 46 *Georgia Reports*, 466, we do not think was well taken. It is true, in that case the clerk was subject to a *pro rata* deduction for time lost, but that circumstance did not control the judgment of the court in that case.

Let the judgment of the court below be affirmed.

WINHAM, KING & ALDRIDGE, plaintiffs in error, *vs.* GEORGE W. MCGUIRE, defendant in error.

1. To entitle different possessions to be tacked so as to make out the time required to establish a title by prescription to land, it is necessary to show that they are successive possessions. But this rule does not apply to the case of a claim to an easement on the land of another, arising out of the facts recited in the ensuing head-note of this syllabus.
2. A licensee who, under a parol license to enjoy an easement of a permanent nature upon the land of another, such as to back water by the erection of a mill dam, expends money and makes investments in pursuance thereof, is not liable to an action of trespass for erecting the dam either by the party giving the license or any subsequent owner of the land which is overflowed; nor is any subsequent owner or possessor of the mill and dam liable to an action for keeping up such dam.
3. The right to such an easement is not forfeited for non-user, unless it be for a period sufficient to raise the presumption of a release or abandonment.
4. The newly discovered evidence on the question of a parol license authorizes a new trial, and the jury can determine whether the terms of the license have been complied with.

Winham, King & Aldridge vs. McGuire.

Prescription. License. New trial. Newly discovered evidence. Before Judge HARVEY. Haralson county. At Chambers. May 19th, 1873.

George W. McGuire brought complaint against Winham, King & Aldridge, for \$1,000 00 damages, alleged to have been sustained by him, through the overflowing of his land by water, caused by the erection of a mill-dam by the defendant. The general issue was pleaded.

The evidence for the plaintiff made this case :

Plaintiff was damaged by the backing of the water caused by the mill-dam, between \$30 00 and \$100 00. The dam was erected some twenty-five or twenty-eight years ago, and has been standing ever since, except perhaps for a short time during the war.

The evidence for the defendant showed that the dam was rather a benefit than otherwise to the plaintiff's land.

The court charged the jury on the subject of prescription as follows :

He first read to them section 2679 of the Code, and then said, in substance, as follows : That if the evidence showed that the defendants, and those under whom they claimed, have had the dam in use for as much as twenty consecutive years before the commencement of this suit, with claim of right to do so, in the manner described in the section of the Code, this would perfect by prescription the defendants' right to so use the dam to the same height as it had been during said twenty years ; that the burden of making out such prescriptive title is on the defendants ; that if the evidence shows that the defendants have abandoned it at any time during the twenty years, by ceasing to use or keep up the dam, this would create such a breach as would destroy the continuity of the possession, and destroy the prescriptive right ; but that if the dam was washed away by freshets and rebuilt in a reasonable time thereafter, or if it was taken down for necessary repairs and again replaced within a reasonable time, such reasonable time would not amount to abandonment, and would not destroy

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the continuity of possession as mentioned in the Code. That if the evidence showed that defendants have such prescriptive right, plaintiff would not be entitled to recover; that a prescriptive right to raise the dam to any particular height would prevent any recovery for the plaintiff, beyond the damages caused by exceeding such height.

The jury found for the plaintiff \$50 00. The defendants moved for a new trial because the verdict was contrary to the evidence, the law, the charge of the court, and because of newly discovered evidence.

In support of the last ground was attached the affidavit of L. H. Davis, to the effect that he was in possession of the land on which the mill-dam was built, in the year 1848; that the land owned by the plaintiff was then owned by G. W. Parker; that in that year deponent and Parker entered into an agreement to the effect that deponent was to build said dam, and that when built it was to remain without limitation as to time, provided it did not put the water out of the banks at the mill "at a common stage of the water;" that deponent built the dam as high as he could under the provisions of this agreement.

Also the affidavits of Ephriam J. Newman and C. D. Lyner, to the effect that they had known the dam for at least twenty-five years, and that it had never been down except for repairs.

Also the affidavit of the defendant, Winham, to the effect that this evidence had been discovered since the trial.

The motion was overruled, and defendants excepted.

This case was tried before Judge McCutchen, at the September term, 1872, of Haralson superior court. The motion for new trial was heard before Judge Harvey, at chambers.

THOMSON & TURNER; W. BROCK, by COLLIER & COLLIER, for plaintiffs in error.

No appearance for defendant.

TRIPPE, Judge.

1. If money has been expended and investments made by reason of a parol license to an easement on the land of another, and for the enjoyment of the same, such as to back water by the erection of a mill-dam, the licensee is not liable to an action for damages for erecting the dam, either by the party giving the license or by any subsequent owner of the land which is overflowed. Nor is any subsequent owner of the mill and dam, or one who is in possession thereof, liable to an action for keeping up such dam: *Sheffield vs. Collier*, 3 *Georgia*, 82. In such a case, as was said in *Mayor, etc., of Macon vs. Franklin*, 12 *Georgia*, 239, the licensee occupies the position of a purchaser for value.

2. It is true that to entitle the different possessions to be tacked so as to make out a prescriptive title to land, it is necessary to show succession in the possessions. But an easement, such as the one referred to, is an accessory to a tenement, and passes with it to a subsequent owner, both as against the proprietor of the servient land who granted the license, and against each successive proprietor: Gale & Whatly on Easements, 7, 8, 354. So that if the present owner of the dominant heritage can show that a former proprietor of the one which bears the servitude, granted the right to the easement, either by deed or by parol, which became irrevocable by reason of expenditures and improvements under it, and whereby such easement attaches as an appurtenant or accessory to the dominant tenement, he is not bound to connect his title or possession with that of the grantee of such easement. Such proof would charge the plaintiff's land with the servitude, as also it would establish it as a right attached to the land of defendant. The same authority just quoted says, (page 6,) "considered with regard to the servient tenement, an easement is but a charge or obligation curtailing the ordinary rights of property; with regard to the dominant tenement, it is a right accessorial to these ordinary rights, constituting, in both cases, a new quality impressed upon the respective heritages."

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3. The right to an easement may be lost by abandonment or forfeited by non-user; but the forfeiture will not be incurred unless the non-user be for a period sufficient to raise the presumption of a release or abandonment: *Rerick vs. Kern*, 14 Serg. & R., 267; *Moore vs. Rawson*, 3 Barn. & Cr., 332; *Liggins vs. Inge*, 7 Bing., 693.

4. The motion for a new trial contains the affidavit of a former owner of this mill and dam, which states that he erected the dam some twenty-five years ago, in pursuance of an agreement with G. W. Parker, the then owner of plaintiff's land. One ground in the motion is this, as well as other newly discovered testimony. This testimony might materially affect the result of the case, under the principle stated with reference to a parol license. The affidavit does not state whether this "agreement" was in parol or not. From the terms used in other parts of the affidavit, it probably was. Plaintiff in error is entitled to the opportunity to use it. The other affidavits were on the question of non-user of the dam. Though probably not of themselves sufficient to authorize the granting a new trial, as evidence on both sides was introduced on that point of the same character, they yet add some force to the claim for another investigation of the case.

New trial granted.

MONTGOMERY AND WEST POINT RAILROAD COMPANY,
plaintiff in error, *vs.* JESSE BORING, defendant in error.

1. Suit was brought against the "Montgomery and West Point Railroad Company, otherwise called the Western Railroad Company." Objection was made to the form of the action. It appeared that the legislature of the state of Alabama had authorized the surrender of the charter of the M. and W. P. R. R. Co., and its incorporation into the W. R. R. Co.; that whatever name this company had, it regularly used the depot at West Point, in the state of Georgia, known as the M. and W. P. R. R. depot; that by act of the general assembly of the state of Georgia, passed in 1887, the M. and W. P. R. R. Co. was incorporated, and its office for the service of writs, etc., fixed at West Point:

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- Held*, that the allegation "otherwise called the Western Railroad Company" was surplusage, and need not be proved.
2. A railroad company which succeeds to the rights and privileges conferred upon another by its charter, becomes also subject to the same liabilities.
 3. In an action against a railroad company for an injury to the person, damages traceable to the act, but not its legal or natural consequence, are too remote and contingent.
 4. It is error for the court to charge the jury that certain enumerated facts, if proven, would constitute negligence. Negligence is a question of fact, of which the jury are to judge from the evidence, and not a question of law.
 5. Where the evidence would have required the jury to have found the verdict wholly independent of an erroneous charge of the court, a new trial will not be ordered.
 6. Whilst this court will always be careful to protect railroad companies against excessive damages, still, when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the finding of a jury except when it is apparent that the verdict was the result of passion or prejudice.

Railroads. Corporations. Damages. Negligence. Charge of Court. Immaterial error. New trial. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

For the facts of this case, see the decision.

A. W. HAMMOND & SON, for plaintiff in error.

1st. This defendant can do nothing in Alabama, and therefore the case should have been dismissed. (See charter—acts of 1837.)

2d. The evidence shows that this defendant did not carry nor wrong the plaintiff. *Allegata* and *probata* must agree: *Felix vs. The State*, 18 Ala. R.; *Dill vs. Rutter*, 30 Ala. R.; 1 Gr. on Ev., secs. 63, 66. The Alabama corporations did the wrong; they are not the same as the Georgia corporation: 1 Gr. on Ev., secs. 63, 64; 2 B. & Ald., (E. C. L.,) 756; 12 East R., 452; 1 B. & B., 538. The case in 12 Wallace S. C. R., 65, is not to the contrary; 1 Black's U. S. S. C. R., 286; 5 Blatchford's C. C. R., 317. This is not in conflict with *Berry vs. M. and W. R. R. Co.*, 39 Ga. R.

3d. The evidence should have been confined to the dam-

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ages alleged : 1 Ch. on Pl., top pages 396, 397 ; 2 Gr. on Ev., sec. 254, and cases cited ; Code, sec. 3070.

4th. The evidence of subsequent sick spell in 1872 was too remote ; 2 Gr. on Ev., sec. 256, and cases there cited ; Code, sections 2944, 3072, 3073, 3074.

5th. Verdict may specify plea on which it was founded : Code, sec. 3560.

6th. As to 11th and 12th grounds in motion, the judge stated certain facts and said they constituted negligence. Negligence is a question for the jury : Wallace *vs.* Clayton, 42 Ga., 443 ; M. & W. R. R. Co. *vs.* Davis, 18 *Ibid.*, 680, (5.) He had no right to intimate opinion, and doing so necessitates new trial : Code, sec. 3248 ; Kitchen *vs.* Verdell, 42 Ga., 537 ; Stephenson *vs.* The State, 40 *Ibid.*, 291 ; Phillips *vs.* Williams, 39. *Ibid.*, 602 ; Whitely *vs.* The State, 38 *Ibid.*, 50-73 ; Horne *vs.* The State, 37 *Ibid.*, 93 ; Scott *vs.* Winship, 20 *Ibid.*, 430 ; Hunter *vs.* The State, 43 *Ibid.*, 484, (4;) Grant *vs.* The State, 45 *Ibid.*, 477 ; Johnson *vs.* Wright, 48 *Ibid.*, 648.

7th. Common law supposed to be of force in Alabama : S., R. & D. R. R. Co. *vs.* Lacy, 43 Ga., 461. At common law, contributory negligence barred recovery : 18 Ga. R., 679 ; 19 *Ibid.*, 437 ; 29 *Ibid.*, 358 ; 28 *Ibid.*, 93, (1;) 35 *Ibid.*, 105 ; 38 *Ibid.*, 409 ; 42 *Ibid.*, 327 ; 56 Penn. St. R., 294 ; 7 Allen, 207.

8th. Court should control counsel in the argument : 11 Ga., 257, 634 ; 12 *Ibid.*, 512, 522 ; 15 *Ibid.*, 399 ; 25 *Ibid.*, 227 ; 43 *Ibid.*, 372. He should have done so in his charge : 17 Ga., 446. Its want may have injured us : 30 Ga., 133.

9th. The verdict was excessive for disabling one for three months to make money, and crippling him for life by broken ankle. We had necessary platforms : 2 Redf. on Railways, p. 241 ; P. R. R. *vs.* Zebe, 33 Penn. St. R., 318. This is not opposed by cases cited by plaintiff's counsel : Sherman on Railways, 321, 322 ; 4 Cush., 400 ; 26 Iowa R., 124-5 ; 56 Missouri, 234 ; 51 Penn. St. R., 331 ; 3 Exch. R., 533 ; 81 E. C. L. R., 178 ; 95 *Ibid.*, 923 ; 115 *Ibid.*, 184.

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B. H. HILL & SON; LESTER & THOMSON, for defendant.

1st. Nothing in objection to form of action. No plea to the jurisdiction: Acts of 1837, p. 201; 39 Ga., 504; 12 Wal., 650; Code, sec. 1686; 37 Ga., 401, 410, 419.

2d. Charge as to damages correct: Code, sec. 3070, *et seq.*; Code, sec. 3068.

3d. Charge as to negligence correct: 28 N. H., 9; 26 Iowa, 124; Shearman & Redfield on Neg., 391; 2 Pars. on Con., 219, *n. (b)* 220; Code, sec. 2067.

WARNER, Chief Justice.

The plaintiff brought an action against the defendant as a common carrier of passengers on its road, to recover damages for an alleged injury caused by the negligence of the defendant. On the trial of the case, the jury, under the charge of the court, returned a verdict in favor of the plaintiff for \$10,000 00. A motion was made for a new trial on the several grounds as specified and set forth in the record, which was overruled by the court, and the defendant excepted. It appears from the evidence in the record that the plaintiff is a citizen of this state, and a physician of thirty years' standing; that he took passage on the defendant's road at Columbus, Georgia, to be carried to West Point, Georgia, on his way to his home in Atlanta, Georgia, and paid the usual and customary fare for such carriage; that at Opelika, in the state of Alabama, (it being the night train between Columbus and West Point,) it had to wait for the Montgomery train from half an hour to an hour before the passengers changed cars going to West Point. Whilst the defendant's train was standing on its track thus waiting for the Montgomery train to arrive on its way to West Point, the plaintiff had occasion to step out of the car, and in doing so, fell into a ditch or sewer nine or ten feet deep below the step of the car, and broke his leg, and was otherwise injured. The car was standing at or near the usual place of receiving and putting off passengers; there were no stationary lights; there were rocks, timbers and oys-

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ter shells in the bottom of the ditch into which he fell. Plaintiff used care and caution in going down the car steps, and when he stepped off the last car step expected to put his feet on the ground instead of stepping into the open ditch, of which he had no knowledge at the time, it being dark. The defendant's conductor of its train had known of the existence of the ditch for three years ; it has since been covered.

1. Objection was made at the trial to the form of the action, the plaintiff averring that the Montgomery and West Point Railroad Company, otherwise called the Western Railroad Company, had damaged him, etc. The court overruled the objection, and held that the latter averment was surplusage, and need not be proved, that the suit was against the Montgomery and West Point Railroad Company. There was introduced in evidence by the defendant, the acts of the general assembly of the state of Alabama authorizing a surrender of the charter by the stockholders of the Montgomery and West Point Railroad Company and its incorporation into the Western Railroad Company of Alabama, for the purpose of showing that there was not in the state of Alabama, at the time of the injury complained of, such a corporation as the Montgomery and West Point Railroad Company. The evidence in the record in relation to this point in the case, is that the company running the railroad from Montgomery, Alabama, to West Point, Georgia, and from Columbus, Georgia, *via* Opelika, Alabama, under whatever name it had, regularly and exclusively used the depot called the Montgomery and West Point Railroad depot in West Point, and kept its agents in said depot, and still does so. The general assembly of this state, in 1837, passed an act incorporating the stockholders of the Montgomery Railroad Company, with all such as might thereafter become stockholders in said company, by the name and style of the Montgomery and West Point Railroad Company, within the corporate limits of the town of West Point, and authorized said company, in its corporate name, to purchase, receive, possess, enjoy and retain to them and their successors, so far as shall be necessary for the location of said

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road, and for the construction of the necessary buildings, etc., and the same to sell, demise, alien, or dispose of; and to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended against, in any courts of record in this state. The 2d section of the act declares that this corporate body and their *successors*, shall exist and continue for fifty years after the completion of said Montgomery and West Point Railroad. The 3d section of the act declares that all bills, writs, processes of whatever kind, known to the laws of this state, may be served upon said company, by leaving a copy thereof at the depot of said company by the sheriff, constable, or other officer authorized to serve the same. By this act the Montgomery and West Point Railroad Company were incorporated as a body politic in this state, with certain defined rights and privileges, on condition that it should be liable to be sued in the courts of this state by her own citizens, in the same manner as other incorporated companies were liable to be sued by them, and service of process for that purpose might be served on it by leaving a copy thereof at its depot, which it was authorized to construct in this state. There was no other corporation than this liable to be sued for an injury done by it to her citizens, which the courts of this state could recognize.

2. The Western Railroad Company is nothing more than the successor of the corporate body created by the act of 1837, either by contract or by operation of law, so far as the rights and privileges, duties and responsibilities, granted and imposed by that act are concerned, in relation to the citizens of this state. If proceedings had been instituted in the courts of this state to forfeit the charter of the Montgomery and West Point Railroad Company for non-user, on the statement of facts set forth in the record, could not the Western Railroad Company have successfully replied that it was the successor of all the rights and privileges granted to the Montgomery and West Point Railroad Company, under the act of 1837, and that, as such successor, it had continued in the exercise of the use and enjoyment of such rights and privileges up to the

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present time? If the Western Railroad Company is the successor of the rights and privileges granted by this state to the Montgomery and West Point Railroad Company by the act of 1837, then it necessarily follows that it is subject to all the liabilities imposed by that act for the protection of the rights and interest of the people of this state. The position assumed on the argument, if sound, would seem to us greatly to impair, if not destructive of the rights of the Western Railroad Company to the enjoyment of the rights and privileges granted by this state to the Montgomery and West Point Railroad Company by the act of 1837. As a matter of course, it cannot expect to enjoy the privileges conferred by that act without incurring the liabilities imposed by it. We find no error in the rulings of the court in relation to the right of the plaintiff to maintain his action against the defendant in the courts of this state for the injury complained of.

3. We find no error in the charge of the court as to the rule of damages. The court stated the rule correctly between general and special damages, and charged the jury that special damages must be proved in order to be recovered, and that damages traceable to the act, but not its legal or natural consequence, are too remote and contingent. The charge of the court as to the question of damages restricted the jury to such damages as resulted from the injury, and excluded speculative and imaginary damages.

4. The court also charged the jury that if they believed from the evidence that certain enumerated facts had been proved, without expressing or intimating to the jury whether such enumerated facts had or had not been proved, then the defendant would be guilty of negligence. This charge of the court, in stating to the jury, as a conclusion of law, that certain facts, if proved, would constitute negligence, was error. Negligence is a question of fact of which the jury are to judge from the evidence, and not a question of law. When negligence has been proved to the satisfaction of the jury, certain legal consequences result therefrom; but it is not the province

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of the court to tell the jury that any given state of facts amount to negligence.

5. If the defendant was negligent, the law declares what shall be the result thereof, and the inquiry is, does the evidence in this record show such a negligence on the part of the defendant as would have *required* the jury to have found a verdict in favor of the plaintiff, wholly independent of the charge of the court? In our judgment, the evidence of negligence on the part of the defendant is so strong and uncontroverted, that the jury were bound to find for the plaintiff irrespective of the error in the charge of the court on that question. The defendant stopped its train on its track from half an hour to an hour, in the night-time, to await the arrival of its other train to convey its passengers to their destination, over an open ditch, six or eight feet deep, at the bottom of which were rocks and timbers, with no stationary lights there, which ditch was known to the defendant's conductor, but unknown to the plaintiff when he stepped out of the car, as he had the right to do under the circumstances; he was precipitated into this pit-fall, had his leg broken and crippled for life. What other verdict could the jury have rendered in this case under the evidence as to the defendant's negligence? If the evidence as to the defendant's negligence had been *doubtful* or *conflicting*, we might have felt it to be our duty to grant a new trial for the error of the court in its charge upon the question of negligence.

6. It has been insisted that the amount of the verdict is excessive, and ought to be set aside for that reason. Whilst this court will always be careful to protect the rights of railroad corporations against colorable and unfounded claims, and against excessive damages founded on such claims, still, when from gross negligence, as in this case, the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the verdict of a jury, except when it is apparent that the verdict is so unreasonable as to induce the belief that it was the result of passion or prejudice. In view of the facts of this case, as disclosed by the

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record, we are of the opinion that the verdict of the jury should not be disturbed.

Let the judgment of the court below be affirmed.

WILLIAM L. WHITMAN, plaintiff in error, *vs.* **WILLIAM McCLURE et al.**, defendants in error.

An attachment was sued out on an account more than four years after it was due; but the debtor had left the state before the bar of the statute had attached, and has never returned to reside in the state. The defendant pleaded the statute of limitations and other pleas:

Held, that the defendant having appeared and made defense, the proceedings became a suit as in cases of personal service, and the removal of the defendant from the state operated a suspension of the statute from the time such absence commenced.

Attachment. Statute of limitations. Before Judge HOPKINS. Catoosa Superior Court. October Adjourned Term, 1873.

William M. Whitman commenced suit by attachment against William McClure and James McClure, on an account for \$896 84, the first item of which was dated September 7th, 1865, and the last item November 13th, 1866, with two credits thereon, the first of \$1 00, dated February 3d, 1866, and the second of \$6 25, of date March 9th, 1867. The claim is consolidated on the last page of the bill of particulars to the declaration attached, as follows:

" *William and James McClure,*

To Whitman & Yarnell, Dr.

" 1872.	July 22d.	To balance on account to date.....	\$498 04
" " "		Interest to date on same.....	263 80
" " "		Profit in saw-mill partnership.....	100 00
" " "		Interest on same from January 1st, 1867	35 00
			\$896 84"

The attachment was levied on January 22d, 1873, by serving process of garnishment on Benjamin F. Clark. The defendants appeared and pleaded the statute of limitations.

The evidence presented the following case :

In July or August, 1865, the firm of Whitman & Yarnell, of which the plaintiff was a partner, contracted with the defendants to build a saw-mill on the land of the latter. Plaintiff's firm was to advance the money for the aforesaid purpose, for the use of which they were to have the profits of the mill for the first twelve months after its completion. The principal was to be repaid out of the first funds from the mill going to the defendants. About the time work was commenced, one of the defendants stated to plaintiff's firm that it would be necessary for them to get some accommodation from the store for their families during the erection of the mill. Under these circumstances the account sued on was contracted. In March, 1871, the plaintiff bought out Yarnell's interest in the store, together with all the books, notes and accounts, including the one sued on. William McClure moved to Chattanooga, in the state of Tennessee, in the latter part of the year 1869, or first of 1870. James McClure moved to the same place on November 1st, 1870. Neither have since resided in the state of Georgia.

The court charged the jury as follows : "If there was no special contract when the debt should become due, and if the account was a continuous and entire transaction, it would then become due on the date of the last item, and the statute of limitations would run from the date it became due, and if the defendants were then resident citizens of this state, and they removed from this state and became resident citizens of another state, and did not return to this state to reside, and the suit was not brought within four years from the date of the last item charged in the account, then the plaintiff would not be entitled to recover. The defendants' removing from the state after the statute had commenced to run, and not returning to reside in the state, did not suspend the running of the statute, and the accounts would be barred if four years elapsed."

The jury returned a verdict in accordance with the above instructions. A motion for a new trial was made on account

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of error in the charge. The motion was overruled, and the plaintiff excepted.

A. T. HACKETT; W. H. PAYNE; J. A. W. JOHNSON, by
R. J. McCAMY, for plaintiff in error.

E. M. DODSON, for defendants.

TRIPPE, Judge.

Section 2929, Code, provides, "if the defendant in any of the cases herein named shall remove from this state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." The court below, in the charge to the jury, and in his decision on the motion for a new trial, construed this section to mean that the defendant must not only have removed from the state, *but must also have returned to reside in the state* before the action was commenced, else the plaintiff could not avail himself of the exception to the statute, and there was no suspension; that is, there must be both a *removal* and a *return to reside*, to disable the defendant from counting the time of the absence in his favor. Whether the court was right in this construction was the question presented, and the only one we decide.

The act of 1852, pamphlet page 239, was an act entitled "an act to stop the running of the statute of limitations in all cases where the defendant shall abscond, or remove beyond the limits of this state," and enacted that the statute "shall, in all cases, cease to run or operate in favor of any person against whom any right of action shall accrue, who shall abscond or remove, *before action is brought*, beyond the limits of this state *until his or her return to the state*." The act of 1856, pamphlet acts of 1855 and 1856, page 235, which was a codification of the acts of limitation, enacts in the 23d section "that when any person against whom a right to sue exists shall remove from this state, the times mentioned in this statute in which suits are to be brought, *shall cease to be computed in his favor from the time of such removal, and so continue until*

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he shall return and fix his residence in this state." Do not both of these acts plainly say that the removal of the defendant from the state, *ipso facto*, works a suspension of the statute, and the suspension continues until in the first he *returns to the state*, and in the second, until he *returns to fix his residence in the state*. Under the act of 1852 he may have remained absent from the state twenty years, but if he returned to the state, was found in the state, so that he could be served with process, he could be sued, and could not plead the statute. Under the act of 1856, if his return and *fixing his residence* in the state were both necessary to occur before it would operate a suspension of the statute, then he could return to the state as often as he might please, and sojourn as long as he pleased, so he did not fix his residence, and could defy the creditors from whom perhaps he had fled. Surely no act ever meant this. The provision in reference to *returning to reside* in the state is first found in the act of 1856. This was doubtless inserted to prevent an abuse by debtors of the former provisions on this point, that a mere return to the state to sojourn for a season might operate to revive the running of the statute. Cases of this sort had occurred. Debtors who had removed and been absent a few years had come back on a visit, remained awhile, and left again for their new home. It was claimed that this return operated to satisfy the terms of the statute; and they afterwards set up, on a future return, and in some instances to become residents again, that the bar of the statute had, by reason thereof, fully attached in their favor. There had been decisions in the circuit courts to this extent, and it was to prevent the frauds that might thus be practiced by these temporary and brief returns, that it was required in the act of 1856 that a *residence* must be *fixed*, or the suspension would continue. Thus the law stood when the Code was adopted. The 2929th section of the Code is, in substance and meaning, what the act of 1856 was. That section says "the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." This does not mean that the statute still runs after his removal unless *he returns*

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to reside. If it does, the debtor; if he once resides abroad the statutory period of limitation, might be half his time within the state, and if he did not become a resident, he could defy his creditors, although it is specially provided by section 3416, Code, that "a citizen of another state passing through this state may be sued in any county thereof in which he may happen to be at the time when sued." We do not think that the rule recognized in *Bishop vs. Sandford*, 15 Georgia, 1, conflicts with this decision in any way. It is there said that courts will not apply a forced construction to bring a party within an exception to the statute. We do not think we do this; but, rather, it would require a forced construction of section 2929 to take the defendant out of it.

The defendants having appeared and made defense to the attachments, the proceedings became a suit as in cases of personal service, and the removal of the defendants from the state operated a suspension of the statute from the time of such removal, and the suspension continues until their residence be fixed in the state. Such, we think, is the plain meaning of the act of 1856, and section 2929 does not change it.

The attachment in this case was levied by serving a summons of garnishment. It does not appear that defendants had any property, real or personal, on which it could have been levied, or that plaintiff could, at any other time after defendants left the state, have levied an attachment.

Judgment reversed.

WILSON ALLEN, plaintiff in error, *vs.* JOHN P. THORNTON, administrator, *et al.*, defendants in error.

1. Where a bill was filed to enjoin the sale of certain land under an execution for the purchase money therefor, upon the ground that no deed conveying the same to the complainant had been filed and recorded in the clerk's office prior to the levy, and the bill was sanctioned, with the privilege to the defendant to file such deed and proceed in the collection of his debt, and an amended bill was presented stating that the

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defendant had again levied and was proceeding to sell, setting up other grounds for injunction, it will be presumed that the deed has been filed and recorded under the privilege allowed in the first order.

2. The mere allegation that the title to the land has failed, in the absence of any charge of insolvency on the part of the defendant, is no ground to enjoin the sale under the execution for the purchase money. The complainant should have set up such defense to the suit on the notes, or look to the covenant in the bond for titles.

Injunction. Pleadings. Vendor and purchaser. Judgment. Before Judge BUCHANAN. Troup county. At Chambers. April 1st, 1874.

For the facts, see the decision.

B. H. BIGHAM, for plaintiff in error.

SPEER & SPEER, for defendant.

WARNER, Chief Justice.

This was an amended bill praying for an injunction, which was refused by the presiding judge, and the complainant excepted. It appears from the record that the defendant's intestate sold to the complainant two tracts of land adjoining, the one containing two hundred and two and a half acres, the other containing four and eight-tenths acres, the complainant giving his notes for the purchase money, and defendant's intestate executing to him two bonds to make title, one for each tract. The defendant, as administrator, obtained judgment on the notes given for the purchase money, and filed a deed to the larger tract of land in the clerk's office conveying it to the complainant, and had the land levied on. The complainant filed a bill and obtained an injunction restraining the sale of the land, on the ground that the deed was not filed and recorded in the clerk's office before the levy was made. The order granting the injunction provided that the plaintiff in execution should not be restricted in his right to file a deed or deeds to the lands, and proceed to the collection of his debt. The complainant then amended his bill,

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and alleged that the defendant had proceeded to have his levy on the land renewed, and the same advertised for sale on the first Tuesday in April, 1874, but does not allege whether the defendant had filed a deed or deeds to the land as he was authorized to do by the terms of the first injunction, and prayed for a second injunction to restrain the sale of the land under the second levy, alleging amongst other things that the plaintiff's intestate did not have a good title to all of the land specified in the bonds therefor made to the complainant; that the paramount title to a part of the land was in a third person. In our judgment, according to the allegations contained in the amended bill, the injunction prayed for was properly refused. If the title to the land has failed, the complainant should have set up that defense when he was sued on the notes for the purchase money, or look to the covenant in his bond for title. There is no allegation that the estate of Thornton is insolvent. If the defendant had not filed a deed to the land in the clerk's office according to law, before he renewed his levy, the complainant should have so alleged in his amended bill, and if the defendant was acting in violation of the first injunction, the court might have attached him for contempt. Construing the allegations in the complainant's amended bill most strongly against him, the presumption is that the defendant had filed a deed in the clerk's office according to law, as he was authorized to do by the first injunction, and was proceeding to the collection of his debt. The complainant does not allege that the defendant had violated the first injunction, which he necessarily must have done if he renewed his levy on the land, and was proceeding to have it sold without having filed his deed in the clerk's office according to law.

Let the judgment of the court below be affirmed.

Crisson vs. The State of Georgia.

MACK W. CRISSON, plaintiff in error, *vs.* **THE STATE OF GEORGIA**, defendant in error.

1. In criminal cases below the grade of felony, the testimony of an accomplice may be sufficient to authorize a conviction.
2. But where the accomplice was impeached by showing that he had before the trial made affidavit that the defendant was not guilty, and stated in his testimony as a reason why he had sworn falsely, that it was done under a threat, which threat was denied by the person charged by him with having made it, he being also a witness:

Held, that it was error in the court in charging on the question of *alibi*—upon which point the defendant had introduced evidence, and which charge was founded solely on the testimony of the accomplice, to say to the jury: “In disposing of the witness to prove the *alibi* you will consider whether there are any material facts proven in the case which challenge your full belief, which are entirely incompatible with the evidence of the witness, Robinson, who proves the *alibi*, then without imputing falsehood to him you will charitably conclude that he was mistaken as to the time, if the witness lived close by the accused, had frequent opportunities of seeing him, and frequently saw him drunk in visiting his house,” etc.

Criminal law. Witness. Accomplice. Alibi. Before Judge **KNIGHT**. Lumpkin Superior Court. September Term, 1873.

Mack W. Crisson was placed on trial for the offense of larceny from the house, alleged to have been committed on October 11th, 1871, by entering the gold quartz crushing mill of William R. Crisson and taking therefrom nine pennyweights of gold. The defendant pleaded not guilty.

The case is sufficiently reported in the opinion.

WIER BOYD; W. P. PRICE, for plaintiff in error.

C. J. WELLBORN, solicitor general, by **C. D. PHILLIPS**; **THOMAS F. GREER**, for the state.

TRIPPE, Judge.

1. The testimony of an accomplice may be sufficient to convict in a case below the grade of felony, and there was no error in the charge of the court on this point: *Parsons vs. The State*, 43 *Georgia*, 197.

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2. We place our judgment granting a new trial on what we think was an error in the charge which the judge certifies he made in reference to the testimony of the accomplice, Adams, when considered in connection with the evidence of Robinson, the witness introduced by the defendant to prove the *alibi*. If Robinson spoke the truth, the defendant could hardly be guilty—at least the testimony of the accomplice was not true. The defendant was drunk, very drunk, so much so that it was with difficulty he could ride his pony, about dark on the night of the robbery. He also went home with a bottle of whisky in his pocket. At the hour that Adams says the house was broken into, Robinson swore that he went to defendant's house; that defendant was in bed drunk; that he sat up awhile and talked with him “a few words and then he fell,” and had his bottle with him. This witness states positively that this was the night of the larceny, and gives his reasons for identifying it. He was unimpeached. Adams was not only an accomplice, confessedly so, and had been convicted for the same offense, but also was pretty strongly impeached. This impeachment was not simply by proving contradictory statements, but he had made an affidavit that defendant was innocent. His explanation of this was that he was induced to make the affidavit, both by promises and threats made by the brother of defendant. These promises and threats were denied by the brother, who was sworn as a witness. The corroborating circumstances were slight, if any. It appeared that there were two tracks near the house broken into, and that one of them was made by a number eight shoe or boot, and that defendant wore that number, as well as many others. Here, then, was a case which the jury was to determine on the evidence. That evidence was the testimony of one who not only swore that he was a felon, in breaking and entering into the house and stealing therefrom—though he was only indicted for larceny from the house—but that he was also guilty of false swearing, and the reasons he gave as palliating the last act were sworn not to be true by another witness. On the other side, the *alibi* was pretty strongly proven by an un-

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impeached witness. It is true there was another witness who was present at the time testified to by Robinson, who was not introduced, and whose absence, unexplained, was doubtless urged in the argument as a circumstance against the truth of the defense. In this state of matters, the question as to who was to be believed, the accomplice or Robinson, should have been submitted to the jury without any undue weight given by the charge to the jury, either to the facts on the one side or the other. Was the charge free from this objection under the peculiar condition in which the case stood before the jury? The charge was, "In disposing of the witness to prove the *alibi*, you will consider whether there are material facts proven in this case *which challenge your full belief*, which are wholly incompatible with the evidence of the witness Robinson who proves the *alibi*, then, without imputing falsehood to him, you would charitably conclude that he was mistaken as to the time, if the witness lived close by the accused and had frequent opportunities for seeing him, and frequently saw him drunk in visiting his house." The only *material facts proven*, which are wholly incompatible with the evidence of Robinson, were stated in the testimony of Adams, the accomplice, and the charge presented the points which the jury might consider for the purpose of discrediting the testimony of Robinson too strongly and prominently, when the source from which the material facts were furnished, on which the rejection was to rest, is considered. It gave the jury every view that could be taken which might weaken the force of the testimony coming from defendant's chief witness, without connecting therewith those that affected the evidence for the prosecution. If there be facts that are proper for the jury to consider in determining the credit to be given to the witnesses on both sides, they should be all submitted to them. If the weak joints in the armor of the one be pointed out, it would be fair to expose the unprotected "heel" of the other. From the view we take of the whole case in connection with this charge, we think a new trial should be granted.

Judgment reversed.

Strickland vs. Wynn et al.

WILLIS STRICKLAND et al., administrators, plaintiffs in error,
vs. JOSEPH B. WYNN, defendant in error.

1. A party to a cause of action on trial is a competent witness to identify a book of accounts sought to be introduced in evidence by him as his book of original entries, even though the opposite party be dead.
2. Where there is evidence to sustain the verdict, a new trial will not be ordered.
3. In order to render newly discovered evidence a ground for new trial, it must appear that it is not cumulative, and that none of the moving parties, nor their counsel, were aware of it at the trial.

Witness. Evidence. Books of account. New trial. Newly discovered evidence. Before Judge BUCHANAN. Heard Superior Court. September Term, 1873.

For the facts of this case, see the decision.

SPEER & SPEER, for plaintiffs in error.

MABRY, TOOLE & SON, for defendant.



WARNER, Chief Justice.

It appears from the record in this case that Strickland filed a bill against Wynn to enjoin him from interfering with the possession of a lot of land in Heard county. Wynn answered the bill, and in his answer, in the nature of a cross-bill, alleged that he had purchased the land from Strickland for \$550 00, paid part of the purchase money, and offered to pay the balance that might be due, and prayed that Strickland might be decreed to make him a deed to the land. Before the trial of the case Strickland died, and his administrators were made parties. On the trial, there was a good deal of evidence introduced by the respective parties as to whether there had been a sale of the land or not, and as to the amount paid for it by the defendant, Wynn, and in what the payments had been made, the defendant contending that he had made payments in lumber, wheat and money, etc., which he sought to prove in part by the introduction of his book of account

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in evidence. As is usual in such cases, the evidence was conflicting. The jury returned the following verdict: "We, the jury, find the land for the defendant, J. B. Wynn, and that he pay the plaintiff, Strickland, the balance of the purchase money, amounting to \$432 86, with interest from the 25th of December, 1868, money to be paid within twenty days from date; and, in case the money is not paid within the time specified, then the land be sold to the highest bidder, and enough of the proceeds to be applied to the payment of the said amount, and the remainder, if any, to go to the defendant, Wynn." The verdict was dated 20th September, 1873. A motion was made for a new trial, on the several grounds set forth therein, which was overruled by the court, and the complainants excepted. The principal grounds urged here for a new trial were that the verdict was contrary to law and the evidence, and because the court erred in allowing the defendant to be sworn and to testify that the book tendered in evidence was his original book of entry, the complainants objecting because the opposite party was dead, and for newly discovered evidence.

1. The allowing the defendant to state, under oath, that the book which he proposed to offer in evidence was his original book of entry, was not such testimony or evidence in relation to the cause of action in issue or on trial as is contemplated by the act of 1866, embodied in the 3854th section of the Code. It was not the intention of that act to restrict the admission of evidence, but to enlarge the rule for its admission. It would have been competent for the defendant to have identified his original book of entry by his own oath before the passage of the act of 1866, as much so as to prove the service of a notice by his own oath. There was no error in allowing the defendant to identify his original book of entry by his own oath at the trial, notwithstanding the complainant was dead.

2. If the jury believed the evidence offered by the defendant (and that was a question exclusively for their consideration) then the verdict is not contrary to law or the evidence.

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3. The newly discovered evidence is only cumulative as to whether there was a contract for the sale of the land by the complainant to the defendant. Besides, only one of the administrators makes oath to the newly discovered evidence, and does not state that *he* has discovered it since the trial, but states that the evidence has been discovered since the trial of the case, but by whom it is not stated, nor does it appear that the evidence was not known to the complainants' counsel at the trial. Parties are never satisfied with the verdict of the jury when it is against them, and this court has no power to compel them to be satisfied; but as it is for the public welfare of the state that there should be an end to litigation when their cases have been passed on by a jury of the country according to law, this court has the power to compel them, not to be *satisfied*, but to *acquiesce* in the verdict and the judgment of the court thereon, which we now do in this case.

Let the judgment of the court below be affirmed.

LEONIDAS A. JORDAN, administrator, plaintiff in error, vs.
GEORGE C. BEAL et al., defendants in error.

When the owner sells land, giving bond for titles and taking notes for the purchase money, which are not paid at maturity, he is not entitled to file a bill to cancel the contract and to recover the land, and in the meantime to have a receiver appointed to take charge of the premises, on the sole ground of the insolvency of the purchaser, it not appearing that the vendee became insolvent after making the contract of purchase.

Equity. Receiver. Vendor and purchaser. Before Judge BARTLETT. Baldwin county. At Chambers. December 20, 1873.

Leonidas A. Jordan, as administrator upon the estate of Benjamin S. Jordan, filed his bill against George C. Beal and Nathan H. Beal, making, in substance, the following case:

On December 1st, 1869, complainant executed to the defendants a bond for titles to a plantation in Baldwin county,

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conditioned upon the payment of their two notes, each for \$3,500 00, bearing interest from date, and due on April 1st, 1871, and April 1st, 1872, respectively, said notes being for the entire purchase money of the property. Immediate possession was given to the defendants, and they have since enjoyed said property and its profits, of the yearly value of \$600. The purchase money was long past due and unpaid except \$600 00. The defendants were insolvent, and had no well-founded expectation of ever paying for the property, but were only trying to use and enjoy it as long as possible. The plantation, if sold, would not bring the principal and already accrued interest due on the notes. Complainant was informed that they were committing waste by cutting off the wood and shade trees around the dwelling. He had demanded possession, which had been refused. He had taken out a warrant to dispossess them, to which George C. Beal had filed a counter-affidavit, setting up that he did, in good faith, claim a legal right to the possession of the premises, which affidavit complainant alleged to be untrue.

Prayer for the rescission of the contract, account as to the rents, an injunction against the waste, the appointment of a receiver, and for general relief.

A temporary injunction against the waste and an order to show cause, were granted.

Defendant, George C. Beal, filed an answer, admitting the contract to be as stated in the bill, and that he had only paid the amount there set forth. He set up that he had greatly improved the property; that it was not worth for rent as much as stated in the bill, and had previously been rented for the amount of the taxes upon it. He denied committing any waste, but said he was only clearing some fifteen acres of fresh land, which was beneficial to the place, and had only thinned out the trees around the house, which was also an improvement; he was working hard to pay for the property, but could not expect to do so if it was taken out of his hands and put into the hands of a receiver.

Affidavits of R. G. Harper and C. R. Harper were read.

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The first sustained the defendant as to the improvements made by him upon the place, and both of them as to the clearing the fresh lands being beneficial.

The chancellor refused the injunction and the appointment of a receiver, and complainant excepted.

WHITTLE & GUSTIN, for plaintiff in error.

WOOTEN & SIMMONS, for defendants.

TRIPPE, Judge.

All questions were eliminated from the case at the hearing by the answer of defendants and the supplementary affidavits, but one. That question is, can the vendee of lands, who sells and gives a bond for title to an insolvent vendor, one who has no property, and so known to the vendor, on the ground of that insolvency, simply, ask for the appointment of a receiver who shall hold the property until a decree can be had canceling the contract of sale? There was no fraud charged. The charge as to waste, etc., was denied by the answer and by affidavits. No authority was referred to showing that such a remedy exists, and we can see much danger and unlimited trouble that would be given to the courts if the principle contended for were a correct one. The owner of property thus selling it does so with his eyes open. He takes the risk. He reserves the title as security. His lien is higher than any other. A specific remedy is given him by statute: Code, secs. 3684, 3886. No fraud in the contract is practiced upon him. He has simply made an imprudent bargain, or comes to the conclusion he has, as his debtor, the purchaser, does not pay him at the time agreed on, and then asks a court of equity to take the land at once out of the possession of the purchaser and hold it for him until he can have a decree to set aside the whole bargain, and then to give him back his land. If this were the rule, or if a holding were made, as is invoked by complainants, under the facts as they appeared at the hearing before the chancellor, every vendor of land who makes a rash

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or imprudent sale would at once seek the remedy, and there would be a harvest of suits for relief from one's own improvidence and error. This would work a greater evil than is the hardship of waiting six months on a suit at law, and a sale as provided by law.

Judgment affirmed.

WILLIAM H. ROSS, plaintiff in error, *vs.* WILLIAM P. HEAD
et al., defendants in error.

1. The granting of leave of absence by court to counsel, unless for providential cause, is of doubtful propriety when it affects the rights and interests of other parties, and should be exercised at all times with caution and circumspection by the court.
2. In this case, the court having granted the claimant's counsel leave of absence, though the docket did not show him to be of counsel, this court will not control its discretion in continuing the case.

Attorney. Leave of absence. Continuance. Before Judge PATE. Pulaski Superior Court. April Term, 1873.

For the facts of this case, see the decision.

L. C. RYAN; C. C. KIBBEE, for plaintiff in error.

No appearance for defendants.

WARNER, Chief Justice.

1. The error assigned in this case is that the court granted a continuance on account of the absence of counsel. It appears from the certificate of the presiding judge, that when the case was finally called for trial that two or three members of the bar, not connected with the case, stated to the court that Samuel Hall, Esq., was the only counsel who represented the case in that court, though his name was not on the docket. The court had granted Mr. Hall leave of absence, not knowing that he was counsel in that case, and for that reason the

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case was continued. The granting leave of absence from court to counsel, unless for providential cause, is of doubtful propriety when it affects the rights and interests of other parties, and should be exercised at all times with caution and circumspection by the court.

2. In this case, the court having granted the claimant's counsel leave of absence, this court will not control its discretion in continuing the case, under the statement of facts disclosed in the record.

Let the judgment of the court below be affirmed.

JOSEPH W. COWART, sheriff, plaintiff in error, *vs.* CHAFFEE, CROFT & CHAFFEE, defendants in error.

1. Service of summons of garnishment on the defendant in execution is not a ground of which the sheriff can avail himself in an answer to a rule against him to show cause why he should not pay the money due on the *st. fa.*
2. The evidence was sufficient to authorize the court to hold that the title to the execution was in the movants.

Rule against officer. Sheriff. Garnishment. Before Judge HERSCHEL V. JOHNSON. Emanuel Superior Court. October Term, 1873.

This case arose upon a *rule nisi*, at the instance of Chaffee, Croft & Chaffee, requiring Joseph W. Cowart, sheriff of Emanuel county, to show cause why he should not pay over the principal, interest and costs, on certain executions in favor of the movants against J. J. Moring.

The respondent answered that he had not paid over to the movants the money due on the executions aforesaid, because he had been served with process of garnishment at the instance of McMurphy & Company, and of Applegate & Company, requiring him to answer what effects he had in his hands belonging to Neil McLeod, the transferree of the same; and for the further reason that the defendant, J. J. Moring,

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had been served with similar process, at the instance of the same parties. Respondent states that he is ready, at any time, to apply the money due on said executions in such way as the court may order and direct.

The issue thus formed was submitted to the court without the intervention of a jury.

Movants denied that Neil McLeod was the owner of said executions, and introduced an assignment of the same as, collaterals, from said McLeod to them, and a reassignment to him, as their agent, for the purpose of collecting the amounts due thereon.

The respondent introduced the affidavit of McLeod, that he was the owner and holder of said executions by due and legal assignment.

It further appeared that the garnishments had been served as set forth in the answer of the sheriff.

The court certifies "that in considering the question of the true ownership of the *ft. fas.*, I believed that the deed of assignment from Chaffee, Croft & Chaffee to Neil McLeod, as agent to collect the same, was a full explanation of McLeod's affidavit, in which he swore that he was the assignee or transferee of said *ft. fas.* as to his fiduciary character in reference thereto."

The court ordered a rule absolute to issue, and the respondent, McMurphy & Company and Applegate & Company, excepted, upon the following grounds :

1st. Because the court erred in not ordering the judgment of McMurphy & Company *vs.* Neil McLeod to be paid from said money.

2d. In not ordering the sheriff to hold a sufficiency of said money to meet the debt of Applegate & Company.

3d. In allowing a rule absolute before defendant in *ft. fa.* had answered the garnishment.

4th. In not making such disposition as would secure McMurphy & Company and Applegate & Company against loss.

The bill of exceptions is not clear as to whether the respondent (the sheriff) was not the sole excepting party. This

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statement is necessary, as a strong appeal was made by the defendants in error for damages for delay, and this uncertainty as to who were the real plaintiffs in error influenced the court in refusing the same.

JOSEPHUS CAMP ; M. B. WARD ; CAIN & POLHILL, by Z. D. HARRISON, for plaintiffs in error.

H. D. D. TWIGGS, for defendants.

TRIPPE, Judge.

1. It cannot be a matter of interest to the sheriff, or one affecting his duty as to paying over to a plaintiff in execution the money raised on his *fi. fa.*, that the defendant in execution has been served with a summons of garnishment. If the sheriff has the money in his hands already collected, as appears in this case, the defendant does not owe the debt any longer, and he even could not be reached by garnishment. The contest seems really to have been whether the movants were the owners of the executions, or one McLeod. The sheriff, in his answer, states that he had been served with garnishment to answer what he had in his hands belonging to McLeod. The creditors of McLeod who had judgments against him, claimed that the *fi. fas.* on which the motion was founded did not belong to defendants in error but to McLeod, and asked that the money in the hands of the sheriff should be paid to their claims against McLeod. Thus the issue was simply who owned the *fi. fas.* on which the money in the hands of the sheriff was raised ? This issue was left to the court, without the intervention of a jury, and the judge decided, under the evidence, that the *fi. fas.* belonged to the movants.

2. In looking through the evidence we find sufficient to sustain the decision of the court.

Judgment affirmed.

Ferguson *vs.* The New Manchester Manufacturing Company.

ANGUS FERGUSON, plaintiff in error, *vs.* **THE NEW MANCHESTER MANUFACTURING COMPANY**, defendant in error.

The filing of a declaration in the clerk's office, when service has been perfected as required by law, will be considered as the commencement of the suit, *aliter* where there has been no service.

Practice in the Superior Court. Service. Before Judge BUCHANAN. Douglass Superior Court. October Term, 1873.

For the facts of this case, see the decision.

R. J. TUGGLE; COLLIER, MYNATT & COLLIER, for plaintiff in error.

WILLIAM EZZARD, for defendant.

WARNER, Chief Justice.

The only question in this case is whether the court erred in dismissing the plaintiff's action, on the statement of facts disclosed by the record. It appears therefrom that the plaintiff filed his declaration in the clerk's office against the defendant, but which was not served so as to give the superior court jurisdiction as provided by law, and the case was dismissed for want of jurisdiction. Within six months thereafter the plaintiff renewed his suit, which second suit was dismissed by the court, and the plaintiff excepted. This case comes within the principle decided by this court in *Gray, executor, vs. Hodges*, 50 Georgia, 262, and must control it. The filing the declaration in the clerk's office, when service has been perfected as provided by law, will be considered as the commencement of the suit, but the mere filing of the declaration, without more, is not the commencement of a suit without service on a defendant, as provided by law, of whom the court has jurisdiction.

Let the judgment of the Court below be affirmed.

Chambers *vs.* Mayo.

IRA CHAMBERS, plaintiff in error, *vs.* **REUBEN MAYO**, sheriff, defendant in error.

There was no abuse of the discretion of the court, under the evidence contained in the record, in refusing to grant the rule absolute against the sheriff.

Rule against officer. Sheriff. Before Judge HERSCHEL V. JOHNSON. Washington Superior Court. October Term, 1873.

This case arose upon a rule against Mayo, the sheriff of Washington county, requiring him to show cause why he should not pay over the amount due on an execution in favor of Chambers against John F. Mills, placed in his hands for collection.

The sheriff showed for cause, as follows :

1st. That he levied the aforesaid execution, but was notified by the United States marshal for the state of Georgia that a bill to enjoin said sale had been filed, and that respondent was required to show cause why the injunction should not be granted as prayed for; that this proceeding was based on the bankruptcy of Mills; that upon being served with a subpoena, he consulted E. S. Langmade, Esq., an attorney at law, who advised him not to sell, stating that as Mills had gone into bankruptcy, the sale, if made, would be void.

• 2d. That on the day aforesaid he was served with an affidavit of illegality to the following effect :

1st. Because no notice of said levy was served on the defendant, Mills, the tenant in possession of the land levied on.

2d. Because said levy was advertised in the Sandersville Herald, a paper unauthorized by law to publish the sales of property for Washington county, and not advertised in any of the public places of the county, as required by law.

3d. Because said land is exempt from levy and sale, under the state laws and bankrupt laws of the United States, as the homestead of the defendant, he having filed his petition to be adjudged a bankrupt.

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The evidence showed that the aforesaid execution was levied on property of the defendant, which was advertised to be sold on June 3d, 1873; that the defendant filed his petition to be declared a bankrupt on the second day of the same month, and the subpoena to the aforesaid bill was dated on the sixth; that the affidavit of illegality was filed on the day of sale.

All of this evidence was objected to by the plaintiff. The objection was overruled and the rule discharged. To all of which the plaintiff excepted.

GILMORE & JORDAN, by PEEPLES & HOWELL, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

The grounds taken in the affidavit of illegality would not, *per se*, relieve the sheriff from liability on a rule. The two first only show, if true, his own default. Nor would his receiving the affidavit, so far as it concerns the third ground, be sufficient, were there not other facts shown in his answer, and at the hearing of the rule: *Sharman vs. Lowe*, 40 *Georgia*, 257. The execution on which the rule is founded has on the back of it, at the usual place of indorsing, the names of plaintiff's attorney, that of Mr. Langmade. There is also on the *f. fa.* an affidavit made just before the levy, and under which the levy was made, stating that the land levied on was subject to the judgment, although set apart as a homestead. This affidavit is signed by E. S. Langmade. The sheriff states in his answer, which is not contradicted, that being in doubt as to his duty, after the affidavit was filed with him, and notice given, that application had been made in the bankrupt court for an injunction, he applied to Mr. Langmade for advice, and was told by him, in substance, that he could not safely proceed. This, it would seem, was sufficient to protect the sheriff against a rule for receiving the affidavit, and certainly justified him on a charge of contempt of the process of the court.

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It is true Mr. Langmade does not seem to have been of counsel in the proceedings on the rule, or to have acted any farther in the matter, so far as the record shows. But he must have been the attorney for plaintiff when the affidavit was filed under which the levy was made; and that was only some five weeks before the day on which the property was advertised for sale, and on which day the affidavit of illegality was lodged with the sheriff and notice given of application for injunction. It was on this state of facts that the sheriff took advice of counsel, as has been stated. Three days after the sheriff received the affidavit of illegality and the above notice, the subpoena in the petition for injunction was issued from the United States district court, and served on the sheriff ten days thereafter, and an injunction did, in fact, issue before the final hearing of the rule. Doubtless the court was satisfied from all this that the sheriff was not in contempt, and was not in collusion with the defendant, or in anywise seeking to aid him in postponing or avoiding the payment of the debt. These facts distinguish this case from those of *Neal vs. Prior*, 11 *Georgia*, 297, and *Kemp vs. Williams*, 41 *Ibid.*, 213. We do not think there was any abuse of discretion by the court in refusing to make the rule absolute.

Judgment affirmed.

STEPHEN BROOKS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Where there is evidence to authorize the verdict, a new trial will not be ordered.

New trial. Before Judge McCUTCHEON. Bartow Superior Court. September Term, 1873.

For the facts of this case, see the decision.

WOFFORD & MILNER, for plaintiff in error.

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A. T. HACKETT, solicitor general, by PEEPLES & HOWELL, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of arson in the night-time. On the trial, the jury returned a verdict of guilty. A motion was made for a new trial on the ground that the verdict was against the weight of the evidence, and without evidence, which motion was overruled, and the defendant excepted. There is no positive evidence that the defendant did set fire to the barn and gin-house as alleged in the indictment. But the circumstantial evidence against him is pretty strong; sufficiently so, in our judgment, to authorize the jury, if they believed the witnesses, to find the verdict they did. It appears from the evidence in the record, that the house was set on fire through the weather-boarding, in the night-time, and was the property of Price. Prince Cranford had his seed cotton, made that year, in the house, unginned. Price had cotton, wheat and oats in the house. The defendant had lived with Price two years before; had a difficulty about dividing the crop; there was bad feeling on the part of defendant towards Price and Prince Cranford. About two or three weeks before the house was burned, defendant said that as soon as Prince Cranford got his stuff and cotton together, he would make him lose more than he would gain; Prince Cranford's stuff and cotton was stored in Price's house, with whom he was living; talked bitterly about him, and was very unfriendly towards Colonel Price; said to one witness that he wished everything Colonel Price had was burned up, and him and his family burnt up in them; that he had cheated him out of his crop for two years; wished Colonel Price's building, and all he had, and his family, were burnt up in it, that it would be a good thing for the country. Said to another witness that he intended to have revenge out of both Prince Cranford and Colonel Price, but did not say how. There is evidence going to show that the defendant was at a meeting

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in the neighborhood the night the house was burned, with his wife and son, about fifteen years old ; that they left the meeting about ten o'clock ; defendant told his wife and son to go on home, and he went in another direction, towards Mr. Best's, in the direction of the burnt house ; the house was discovered to be on fire about one or two o'clock. From the threats of defendant, he had a *motive* and *wish* that both Price and Cranford should be injured just as they were by the burning of the house. In view of the circumstances showing the bad feeling of defendant and his threats towards Price and Cranford, and leaving his wife and son to go home by themselves at that time of night, and he going in another direction, it is a most significant fact that he made no attempt to account for himself, or where he was, at the time the house was discovered to be on fire. As a general rule, honest people can give an account of themselves when it is necessary to do so, as it was for the defendant in this case. Although we might not have found the defendant guilty under the evidence, still we cannot say there was *no evidence* to authorize the verdict which the jury have found, and therefore we will not disturb it.

Let the judgment of the court below be affirmed.

EUPHEMIA H. PARISH, plaintiff in error, *vs.* EDMUND T. MURPHY, defendant in error.

Under sections 1963, 1964, Code, a mechanic, in the action therein allowed for the recovery of his claim, and for the enforcement of his lien, may not only obtain a judgment allowing the lien, but also have a general judgment for his claim against the debtor, to which all of his property is subject.

Mechanic's lien. Judgments. Before Judge GIBSON. Richmond Superior Court. October Term, 1873.

Euphemia H. Parish brought complaint against Edmund T. Murphy for two adjoining lots of land, situate on Hole

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street, in the city of Augusta. The defendant pleaded title in himself by reason of a deed from the sheriff of the city of Augusta, made to him under a sale of the property in dispute, by virtue of an execution against the plaintiff.

The plaintiff showed title in herself by deed from the city of Augusta, dated October 23d, 1863, with possession thereunder to February 4th, 1868, when she was dispossessed by the sheriff of the city of Augusta, and the defendant placed in possession.

The defendant introduced an execution against the plaintiff in favor of William H. Rich, which commanded the sheriff of the city of Augusta to make the money out of certain property on Calhoun street therein specified, and also "of the other goods and chattels of said defendant." Showed the sale of the Hole street property thereunder, and the deed of the sheriff made in accordance therewith.

The plaintiff, in reply, introduced the record of the suit in which the execution aforesaid was obtained, from which it appeared that Rich had sued the defendant on an account, to which was added a count on a mechanic's lien against the Calhoun street property. Judgment was rendered in favor of Rich, to be levied of the Calhoun street property, "and also to be levied of the other goods and chattels of said defendant."

The court charged the jury that the execution under which the defendant claimed the property in dispute legally authorized the sheriff to sell and convey the same, and if the said property was, by virtue of said execution, sold and conveyed to the defendant, the plaintiff was legally divested of her title, and all title that she had passed to the defendant.

To this charge the plaintiff excepted. The jury found for the defendant. Error is assigned upon the above ground of exception.

McLAWS & GANAHIL, by R. H. CLARK, for plaintiff in error.

JAMES S. HOOK, by SAMUEL F. WEBB, for defendant.

Parish vs. Murphy.

TRIPPE, Judge.

Can a mechanic, under sections 1963 and 1964 of the Code, institute suit for the enforcement of the lien provided for in section 1959, against the specific property on which his lien attaches, and in the same action obtain a general judgment against his debtor for the same debt? That is the main question presented in this case. We see no reason why this right should not exist. There is nothing in any of the provisions of the Code connected with this subject that at all indicates a contrary meaning. The two sections referred to use the usual terms applicable to ordinary suits, such as "the commencement of an action for the recovery of the amount of his claim," and "in declaring for such debt," etc. It is true it is stated that "if the lien is allowed, the verdict shall set it forth, and the judgment and execution be awarded accordingly." There need be no difficulty in all this under the decision we make. The pleadings must show the debt just as well as if they were only for the enforcement of the lien as they must when a general judgment is also claimed. If the creditor (mechanic) must prove his claim as fully to enforce his lien as he does to obtain a judgment having a general lien, what objection can there be in principle to his having both? The action is commenced at the usual time, served in the usual way, and awaits the second term, as all other suits do. It is not like the case of foreclosing a mortgage on personal property or of enforcing liens by summary process under the steamboat law. In those, the executions issue without notice to the debtor, and are properly confined to the specific property on which the lien is claimed. It is more like the case of an attachment, where the defendant replevies, or appears and defends, or has been notified of the attachment. In either of these cases the judgment binds all his property, but still retains the special lien on the property attached, and as directed by the law shall be first levied on such attached property: Code, section 3228. We hardly think that this rule as to what property shall be first levied on applies to the case of a suit by a mechanic. It

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is a special provision made with reference to all attachments. The case of *Dunning & Tuttle vs. Stovall et al.*, 30 Ga., 444, is not by any means in conflict with the construction we give these provisions of the Code. That was a suit by the mechanic against a trustee to enforce his lien against trust property. The suit was commenced too late for that purpose, the debt having been due more than twelve months. A demurrer being sustained, plaintiff moved to strike out so much of the declaration as referred to the lien, and to amend so as to proceed against the trust estate generally, at law; and this court held he was entitled so to do. This shows, at least, that such addition to a declaration, so as to proceed as at common law, was not adding a new cause of action. Upon the whole, the ruling we make is obnoxious to no well-founded objection as we can see, either in reason or in principle, and it certainly has the merit of making but one suit where two would otherwise be necessary, with additional cost to the parties and trouble to the courts.

There was another point made in the case which we will notice. It was objected that the judgment awarded by the court, there being no plea and no verdict, did not order or direct that a general execution should issue, but did award that there was a lien for the amount of the judgment on the premises set forth. The judgment was for the plaintiff for a certain amount, with interest from a certain date, and cost, and then added, "for which amount the plaintiff has a lien on the premises set forth," etc. This was sufficient. If no lien had been claimed, the judgment was sufficient without the addition of any words as to the lien. When such a lien is asserted and allowed, "the verdict (judgment) shall set it forth, and the judgment and execution be awarded accordingly :" Revised Code, section 1964. This judgment was, in effect, just what a verdict and judgment should have been, had it been a case where a verdict had been rendered. As to the objection made to the judgment entered by counsel, that it recited, after directing execution to be issued against the property set forth, the words, "and to be levied of the other goods

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and *chattels* of the defendant," and that under such a judgment no execution could be issued and levied on other real property of the defendant, we make this reply: It is more than doubtful, whether, under the judgment awarded by the court, there was any need for another signed by counsel. Why could not the execution issue on the first as well as the last judgment? It is proper to enter up judgment on a verdict, but is there any law or practice requiring a judgment to be entered on a judgment? In this case, the execution was a general as well as a special one; that is, it commanded the sheriff, "of the goods and chattels, lands and tenements of," etc., "you cause to be made the sum of," etc., and then directed a levy on the special property on which the lien was claimed. Moreover, the levy and sale were made five years before the defendant therein brought ejectment to recover back the property thus sold. Her tenant had notice of the levy. She permitted the property to be sold, and the money paid for it to be applied to her debt. Is she not too late to complain of the irregularities in the proceedings which she now seeks to set up—I mean in the judgment entered up by the attorney in the suit against her, on which the judgment was obtained, and those that are complained of in the execution?

Judgment affirmed.

LILLIE MATTHEWS, plaintiff in error, *vs.* THOMAS J. WOOLFOLK *et al.*, executors, defendants in error.

1. An action having been brought against the defendants, as executors, charging their testator as an executor *de son tort* of the father of the plaintiff, with having appropriated the rents and profits derived from a certain lease belonging to said father's estate, and seeking to render them liable for double the value of the same; to allow a count to be added seeking to render the defendants liable on a breach of covenant for quiet enjoyment contained in said lease, would be to authorize an amendment introducing a new and distinct cause of action.
2. Where witnesses, in explaining how they went into possession of certain property, state that it was under a lease, the answer is inadmissible. The lease should be produced or its loss accounted for.

Executor de son tort. Amendment. Evidence. Before Judge BARTLETT. Jones Superior Court. October Term, 1873.

This is the second time this case has been before this court: See *Horne vs. Woolfolk*, 45 Ga. R., 546. The marriage of the plaintiff with Jesse M. Matthews, pending the litigation, accounts for the change of name.

The facts are briefly as follows: Lillie Horne brought case against Thomas J. Woolfolk and John Woolfolk, as executors of Thomas Woolfolk, deceased, alleging that her father, Ferdinand Horne, died on January 3d, 1848, owning a ten years' lease on part of a certain lot in the city of Macon, on which, by contract with said Thomas Woolfolk, the owner, he had erected a large frame building, covering nearly the whole space leased, with the privilege of removing the same, or of requiring said Woolfolk to keep and pay for it at a fair valuation; that the lease would have expired on September 1st, 1854, thus leaving six years and eight months to run after the death of said lessee; that the land leased was worth, without the house, \$300 00 per annum for rent, and with the house, \$200 00 additional; that said Woolfolk, the lessor, shortly after the death of plaintiff's father, the lessee, took possession of said property, and continued to appropriate it to his own use until his death, in August, 1863; that the defendants have continued said possession and appropriation since the death of their testator; that the house is worth \$300 00; that the amount due by the defendants is \$6,000 00; that plaintiff's father left, at his death, her mother and herself as his only heirs, and no debts due by his estate, thus entitling her to one undivided half of the same; that, under the law, she is entitled to recover twice this amount; that she prays process.

The plaintiff subsequently amended her writ by adding a count on a breach of the covenant for quiet enjoyment contained in the lease. On demurrer, said amendment was stricken, and plaintiff excepted.

Plaintiff tendered in evidence the depositions of William

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Dibble and T. N. Mason, to show that they were placed in possession of the property leased to Ferdinand Horne by defendants' testator. It appeared from their answers to cross-interrogatories that they went into possession under a written lease "subject to Horne's lease." Their entire testimony being in reference to this point, their answers, on objection of defendants, were excluded. To which ruling plaintiff excepted.

Plaintiff having closed, a non-suit was ordered. Error is assigned upon each of the above grounds of exception.

J. RUTHERFORD; JAMES H. BLOUNT, by R. H. CLARK, for plaintiff in error.

WHITTLE & GUSTIN; LANIER & ANDERSON, by brief, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants as executors *de son tort* of one Ferdinand Horne. The plaintiff amended her original declaration by adding a count for breach of a covenant contained in a certain lease for quiet enjoyment of certain premises mentioned therein. At the trial, the defendants demurred to this second count, on the ground that it introduced a new and distinct cause of action. The court sustained the demurrer, and plaintiff excepted.

1. The court did not err in striking the amendment from the plaintiff's declaration. No amendment adding a new and distinct cause of action is allowable: Code, sec. 3480. The judgment against the defendants in the original action as executors *de son tort*, if the case had been made out against them by the evidence, would have been for double the value of the property of Horne, wrongfully possessed and converted by them, whereas the judgment for a breach of a covenant for quiet enjoyment would have been governed by a different rule as to damages.

2. The plaintiff offered in evidence the interrogatories of

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Mason & Dibble for the purpose of showing that the defendants put them in possession of Horne's property after his death. In answer to cross-interrogatories put to the witnesses, Mason, one of the firm of Mason & Dibble, answered, "that they went into possession of the property under a written lease. We did know of the lease to Horne, and we did lease the property subject to Horne's lease." The evidence offered was objected to by defendants, until the lease, under which the witnesses went into possession, was produced. The court sustained the objection, and the plaintiff excepted. The defendants were sought to be made liable, because they had leased the premises to Mason & Dibble, having previously leased a part thereof to Horne, who was dead, and whose lease had not expired at the time of the lease to Mason & Dibble. If they went into the possession of the property under that lease, they entered according to the terms of it. What were the terms of that lease? Did it authorize Mason & Dibble to take possession of the property previously leased to Horne, or was the property previously leased to Horne specially exempted in the lease to Mason & Dibble? They say that they leased the property from the defendants subject to Horne's lease, and the lease itself was the highest and best evidence as to what property the defendants did lease to them, and should have been produced or its loss accounted for, the more especially as the plaintiff sought to charge the defendants with having wrongfully leased Horne's property to Mason & Dibble, and thereby to make them liable as executors *de son tort*.

Let the judgment of the court below be affirmed.

WILLIAM P. CASSELS, trustee, plaintiff in error, *vs.* USRY,
STURGIS & COMPANY, defendants in error.

1. A letter written by the attorney of the plaintiff to the defendant is not competent evidence for the defendant, on the trial of the case, unless it is shown that it was written by authority of the client.

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2. The granting of the new trial by the court below was not such an abuse of discretion as to demand a reversal of his judgment.

Attorney and client. Evidence. Principal and agent. New trial. Before Judge GIBSON. McDuffie Superior Court. March Term, 1873.

William P. Cassels, as trustee for Mary J. Cassels, brought complaint against Usry, Sturgis & Company upon the following account:

"1866 and 1867. *Usry, Sturgis & Company,*
To W. P. Cassels, trustee for Mary J. Cassels, Dr.
"To the one-fourth of lumber sawed from logs on
his land by mill..... \$4,000 00."

The defendant pleaded the general issue, settlement, payment and set-off.

In the course of the trial, the defendants offered in evidence the following letter from H. C. Roney, of counsel for plaintiff, to Usry, one of the defendants:

"THOMSON, GEORGIA, February 23d, 1871.

"*Dear Usry:* Since more fully investigating the matter between yourself, Sturgis and Cassels, Cassels claims to have had a full settlement with Sam Neal up to December, 1866, and that all timber sawed in 1867 remains unpaid for, which amount he has Neal's own book to show how much was cut in that year, which he sums up to be two hundred and sixteen thousand eight hundred feet, deducting one-fourth, Cassels' share, which is fifty-four thousand two hundred. Besides showing this fact, he can also show the purchasers of this lumber, which shows conclusive as to the amount. Now, according to this calculation, you will perceive Cassels' share will be some \$2,000 00. * * * Yours, etc.,

(Signed)

"H. C. RONEY."

To this testimony the plaintiff objected. The objection was overruled and the evidence admitted.

The evidence was voluminous, and is omitted because it illustrates no principle of law.

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The jury found for the plaintiff \$500 00. The defendants moved for a new trial because of alleged error in the admission of the aforesaid letter, and because the verdict was contrary to the evidence. The motion was sustained in the following judgment :

"After carefully examining the evidence in this case, I find none to sustain the verdict, except it be possibly the letter of plaintiff's attorney, written seemingly to secure a settlement of probable litigation. Whilst this might possibly be construed to reduce the plaintiff's claim to that sum, I do not understand how it could create a liability on the part of defendants to pay that sum. The motion for new trial is therefore sustained, and the verdict set aside, and a new trial ordered."

To which ruling defendants excepted.

H. C. RONEY; W. M. & M. P. REESE, by brief, for plaintiffs in error.

TOOMBS & DUBOSE; W. T. ONEAL, for defendant.

TRIPPE, Judge.

1. We cannot see any legal ground upon which the admission in evidence of the letter of Mr. Roney, counsel for plaintiff, can be put. It was written before the suit was instituted. The plaintiff certainly could not have introduced it himself. For what purpose can defendant use it upon a trial of the case on its merits? If it had contained an admission that the writer did not think the defendants owed his clients anything, it could not have been introduced against the client as evidence of such a fact. Had it been shown that it was written by the direct authority or consent of the client, the question would be different. But we do not think that a letter which an attorney may write to the opposite party, and that, too, before suit, and upon which no action on the part of that other party was claimed to have been taken, or any injury thereby accrued to him, can be used as evidence on the trial simply to prove or disprove facts on which the merits of the case rest.

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2. As to the new trial which was granted by the court, we will not interfere. It appears pretty plainly from the record, that the jury gave the plaintiff a verdict for his interest in the lumber that was sawed after 1866—one-fourth of two hundred and sixteen thousand eight hundred feet. They refused to find for any portion of the lumber sawed previously. If this be so, there was the plea of the defendants that they had paid out for plaintiff the sum of \$195 87 to Pollard, Cox & Company, and \$85 37 to Wilcox & Gibbs. Sturgis, one of the defendants, testified that these payments were made in 1867. If, then, the verdict intended to allow the plaintiff only for lumber sawed in that year, it would seem that a credit or set-off for those amounts should have been given. We admit we cannot tell to our full satisfaction how the verdict was exactly reached, whether these items were passed upon or not. We are rather inclined to think they were not, and under the rule adopted not to interfere with a judgment granting a new trial on the ground that the verdict was not sustained by the evidence, or was against the weight of the evidence, unless it be a very strong case demanding it, we will not reverse the judgment allowing the new trial in this case. It may be added that we would have affirmed the judgment if the new trial had been refused; and just such a case frequently happens.

Judgment affirmed.

ELLA W. SCURRY *et al.*, plaintiffs in error, vs. THE COTTON STATES LIFE INSURANCE COMPANY, defendant in error.

1. Where an action was brought by the widow and children of the assured on the following receipt:

"Received of James R. Scurry \$875 00, same being in payment of insurance in the Cotton States Insurance Company; this receipt being binding on said company until policy is received."

"J. S. RAINES,

"Agent of C. S. Life Ins. Co., of Macon, Ga.

"Baker county, Georgia, September 6, 1871."

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And Raines, the agent, signing said receipt, was offered by the defendant as a witness:

Held, that he was competent, not being a party to the original contract with James R. Scurry, nor interested therein.

2. It was competent for the witness to explain what was the understanding of the parties, at the time the receipt was given, of the following words contained therein: "This receipt being binding on said company until policy is received."
3. Where cross-bills of exception were filed and the record in the case was sent up with the bill of exceptions, which arrived in time for the last term of this court, and no record accompanied the exceptions which were returned to this term, the writ of error to this term will not be dismissed for the absence of a record, but the case will be heard on the record returned to the last term. (See Report. R.)

Witness. Party to suit. Evidence. Before Judge STROZER. Dougherty Superior Court. April Term, 1873.

When this case was called, a motion was made to dismiss the writ of error, because no record accompanied the bill of exceptions. The facts on which this motion was based were as follows: At the trial of the case, cross-bills of exceptions were filed. The record came up in the case in which the Cotton States Life Insurance Company was plaintiff in error, determined at the last term of this court. This case arrived too late for last term, and was therefore returned to the present term. No record accompanied the exceptions. Both bills of exception were based on the same record. The motion was overruled, the court enunciating the principle embraced in the third head-note.

For the remaining facts, see the decision.

VASON & DAVIS, for plaintiffs in error.

SMITH & JONES; G. J. WRIGHT, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on the following instrument:

"Received of James R. Scúrry three hundred and seventy-five dollars, same being in payment of insurance in Cotton

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States Insurance Company; this receipt being binding on said company until policy is received.

J. S. RAINES,

Agent of C. S. Life Ins. Co., of Macon, Ga.

Baker county, Ga., Sept. 6th, 1871.

On the trial of this case, Raines, the agent, was offered as a witness for the defendant to prove, amongst other things, that it was the intention and understanding of himself and Scurry at the time of giving the receipt, that it was to bind the company to return the premium if the policy was refused, and to bind the company until the application for policy was acted on by the company. This was fully understood between the applicant and himself and fully talked over. The application was refused by the company. This evidence was objected to by the plaintiff on two grounds: First, because Scurry, one of the contracting parties, was dead; second, because the evidence offered would contradict and vary the terms of the written instrument. The court overruled the objections, and admitted the testimony of the agent, and the plaintiff excepted.

1. By our evidence act of 1866, no person shall be excluded from giving evidence on the trial of any issue in any court, by reason of interest, or from being a party, except where one of the original parties to the contract or cause of action in issue or on trial is dead; in that case the other party shall not be admitted to testify in his own favor: Code, 3854. The parties to the contract or cause of action in issue or on trial, were the Cotton States Insurance Company and Scurry. Raines, the agent, who was offered as a witness, was not a party to the contract, and had no interest in it. The contract was made between the insurance company and Scurry, who were the parties to it. No corporator of the insurance company, or other person having an interest in that company, was offered as a witness to testify in its own favor against the other party. The witness, Raines, was not one of the original parties to the contract or cause of action in issue or on trial, as contemplated by the statute, and was therefore a competent witness. In the case of *Doe vs. Robinson*, 37 Georgia Re-

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ports, 118, Stamper was a party to the record and interested in the recovery, which depended on a contract made between him and Robinson, who was dead. This court held in that case, that Stamper, the living party to that contract, was not a competent witness to prove his version of it, because Robinson, the other party thereto, was dead, and could not be heard.

2. Receipts for money may be explained by parol: Code, sec. 3807. The intention of parties to a contract may differ among themselves. In such case the meaning placed on the contract by one party, and known to be thus understood by the other party at the time, shall be held as the true meaning. Parol evidence is inadmissible to add to, take from, or vary a written contract; but all the attendant and surrounding circumstances may be proved, and if there is an ambiguity, latent or patent, it may be explained; so, if a part of a contract only is reduced to writing, (such as a note given in pursuance of a contract,) and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible: Code, sec. 2757. From the evidence contained in the record in this case, Raines, the agent, had no power or authority to bind the company to issue a policy of insurance until the application therefor had been submitted to the company for its acceptance or rejection; and that being so, it was competent for the witness to explain what was the understanding of the parties at the time the receipt was given, by the words contained therein, to-wit: "This receipt being binding on said company until policy is received"—the more especially as the witness states he did not have a printed form of the receipt with him at the time, but intended substantially to comply therewith to the best of his recollection. The printed form of receipt, as required by the company, contained the words, "in case of non-acceptance of said application, the amount received is to be returned." In view of the facts as disclosed by the record in this case, we affirm the judgment of the court below.

Judgment affirmed.

Hill vs. Harris.

The last bill says there were as many as five notes; that Dennis told B., P. when both Hills were at home, that Harris had taken up a land note, and that the balance due thereon with interest to 25th December, 1863, was \$3,248 87, and Harris desired to renew it and give time, and B. P. and J. M., and Dennis made this new note dated back to 22d March, 1863, supposed date of purchase. In 1867, Harris and Dennis repeated said representations and thus got the note sued on, for the one last mentioned, leaving Dennis off. Afterwards, Harris sued. John M. offered him \$2,000 00 cash when service was acknowledged, but Harris declined, saying, the debt was for land. Counsel advised the note could not be scaled under the said facts, and no defense was filed. Meanwhile all the notes were taken up, as supposed, except one, which Mitchell's estate held and sued. After judgment, and too late to move for new trial, Mr. Adams presented one of the notes. Then first they discovered the mistake or error, and suspected Harris. Harris asserted he had bought land note, and made contradictory statements, saying he could not explain. When the former bill was drawn they did not know all the facts, and they hastened to prevent the sale. Harris denied the fraud charged.

Burwell P. Hill, in his affidavit, swears that on 22d March, 1863, he gave the note \$3,248 87, because Dennis said Harris had taken up his land note, and the renewal, in 1867, was given solely upon the idea aforesaid; that after *judgment* the \$5,450 note was presented, and then, for the first time, deponent discovered Harris' deceit.

The answer denied all fraud and concealment. It declared that John M. Hill was advised before Mitchell was seen, that Dennis and Harris were going to Mitchell's to invest Harris' Confederate money in their note, and approved thereof, and said good notes were worth a premium. Harris does not remember the exact *manner* of making the investment. He thinks he bought and took up one of their notes. At any rate, he paid Mitchell something over \$3,000 00 of Confederate money which he held for his wards, collected on debts, and without

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an avowal that it was his money, and without any statement of the falsehood charged.

Pursuant to the arrangement which he trusted Dennis, Hill's agent, to complete, Dennis did bring him the note of B. P. Hill with Dennis and John M. Hill, as security for \$3,248 87. He, Harris, was not present, and had nothing to do with getting this note. The gist of the arrangement was that for each dollar of Mitchell's claim canceled by him, he should have the note of the debtors and give longer time, and this was fully understood by Dennis and Hill. He does not know what Dennis told them, but Dennis was honest. Was himself to give the note, and doubtless told the truth. Harris never said anything to the Hills about it, except after Dennis, who was perfectly good and solvent, offered his own note for \$2,500 00 for the said note, and defendant declined. There was a negotiation to release Dennis by giving the Hills further time upon a mortgage security, and all that there was said touching the Mitchell trade was with a view of learning whether the note should be scaled, and the note was scaled about \$900 00, and thus renewed in February, 1867.

The answer set out the former bill and relief affidavit as estoppel, and also to contradict complainant's present bill, and to show that the Hills had suffered no wrong, and if the Mitchells were injured, John Mitchell, long since discharged from his executorship, could not transfer the claim to Hill. It denied the tender. Person's affidavit showed that Harris, and not Dennis, for D. P. Hill, paid Mitchell the money.

W. F. WRIGHT; B. H. HILL & SON, for plaintiff in error.

A. W. HAMMOND & SON, for defendants.

1st. As to parties, see *Hill vs. Harris*, 42 Ga. R., 412. Harris solvent, discretion of Judge: 43 Ga. R., 176, 631; 42 *Ibid.*, 386.

2d. The matter is *res adjudicata*: See *Field vs. Sisson et al.*, 40 Ga. R., 67; *Gillion vs. Massey*, 41 *Ibid.*, 221; *Black vs. Black & Hunter*, 27 *Ibid.*, 46-7; *Hill vs. Harris*, 42 *Ibid.*, 412.

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3d. The record shows such negligence as bars the plaintiff: See Hill *vs.* Harris, 42 Ga. R., 412; Code, secs. 3126, 3129, and cases cited; Bostwick *vs.* Perkins *et al.*, 1 Kelly, 137, 139. Ignorance and diligence must concur: Taylor *vs.* Sutton, 15 Ga. R., 107; Avery *vs.* United States, 12 Wallace U. S. R., 304. What diligence required: See Tindal *vs.* Harkenson, 19 Ga. R., 450; Castleberry *vs.* Scandrett, 20 *Ibid.*, 246; Collier *vs.* Harkness, 20 *Ibid.*, 362.

TRIPPE, Judge.

To reverse the judgment in this case and direct the injunction to be granted would be to allow a party to be relieved from his own *laches*, under circumstances which would be in direct conflict with all rules requiring diligence. It was, at any time for several years, within the power of the complainant to ascertain all the facts on which he now rests the equity he claims; and this before the suit was instituted on which the judgment was obtained which is now complained against. It is also true that the very suit on which that judgment was rendered contained notice of the facts which are at this late day attempted to be set up as furnishing grounds for setting the judgment aside and granting a new trial. If complainant had been before that time misled or deceived by defendant in error, the plaintiff in the judgment, it was his own inexcusable negligence that he did not awake to the fact that he had been so misled. On the same day he was sued in the action in which the judgment was rendered, he was also sued on one of the other notes, and the two declarations contained all that was necessary to put any man of ordinary prudence on inquiry as to all the matters of the alleged defense. *Vigilantibus non dormientibus lex subvenit.* For a decision in this same case, which really almost determines this—certainly it does as to the great principle controlling it—see *Hill vs. Harris*, 42 Georgia, 412.

Judgment affirmed.

W. M. & R. J. LOWRY, plaintiffs in error, *vs.* ANDREW M. SLOAN, defendant in error.

1. Where the charter of a bank provides that judgment obtained on its bills may be levied upon the individual property of its stockholders, upon a return of no property being made as to the bank, a stockholder who has had notice of the suit and made no defense thereto, has had his day in court, and cannot set up any defense which might have been made before judgment.
2. Where an offer of compromise and settlement of pending litigation is made by the complainant to the defendants, and accepted by them, but the contract thus entered into is not executed by the payment of the money, the fact that complainant paid no further attention to the suit, and defendants obtained a judgment against him, affords no ground for an injunction against the enforcement of the execution based on such judgment.
3. Suit was pending in favor of the defendants against the Bank of the Empire State, in which the complainant was a stockholder. In January, 1873, complainant wrote to defendants, proposing, as a compromise, to pay \$2,000 00, in full of his liability. This offer was accepted on March 1st. No money being paid, on the 20th of the following May, defendants entered judgments against said bank for \$10,668 32. Executions were issued, and returns of no corporate property to be found made. They were then levied on the property of the complainant. He sought to enjoin any further proceedings on said executions, because of the aforesaid compromise, and because the bank made an assignment of its assets for the benefit of its creditors, in 1866, and the defendants, with other creditors, filed a bill in the district court of the United State against said assignee, and recovered a decree for the assets then in hand. A part of these assets were certain bonds of the county of Floyd, which were in litigation. The complainant alleged that their value had never been credited on the aforesaid executions. The injunction was granted as prayed for. Subsequently, on the filing of the defendants' answer and affidavits, the chancellor modified said restraining order, so far as to allow the execution to proceed for \$2,000 00:

Held, that the chancellor should hear evidence by affidavits as to the solvency of said bonds received by the defendants, and if the same shall be shown to be solvent, direct that the amount thereof be credited on said executions, and that being done, that the injunction be dissolved.

Injunction. Compromise and settlement. Banks. Corporations. Judgments. Before Judge UNDERWOOD. Floyd county. At Chambers. December 3d, 1873.

Lowry *vs.* Sloan.

For the facts of this case, see the decision.

E. N. BROYLES; R. ARNOLD, for plaintiffs in error.

R. D. HARVEY, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, praying for injunction to restrain the defendants from the enforcement of executions issued on judgments obtained against the Bank of the Empire State, of which the complainant was a stockholder. The injunction prayed for having been granted, a motion was made to dissolve the same on the filing of the defendants' answer and affidavits in support thereof. On the hearing of that motion the court modified the injunction, so far as to allow the defendants to collect the sum of \$2,000 00 on their executions, and continued the injunction as to the balance due thereon. Whereupon the defendants excepted.

It appears from the record, that on the 20th May, 1873, the defendants, as bill holders of the Bank of the Empire State, obtained judgments against the bank for the sum of \$10,668 32, on which executions issued, and a return of *nulla bona* having been made thereon by the sheriff, against the corporation, the same was levied on the property of the complainant as one of the stockholders thereof. The eleventh section of the charter of said bank, declares "that the person and property of the stockholders in said bank, shall be pledged and bound in proportion to the amount of the shares that each individual, or company, may hold in the same, for the ultimate redemption of said bills or notes issued by or from said bank during the time he, she or they may have held such stock, in the same manner as in common commercial cases, or simple cases of debt; that the private or individual property of each stockholder, as well as their joint property, shall be liable as before stated for the redemption of the bills of said bank, and for the payment of all the debts and liabilities

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of the same, and when any judgment shall be obtained against said bank, and execution issued thereon, it shall be the duty of the levying officer first to levy the same on the property of said corporation, and to sell the same, and if the proceeds thereof shall be insufficient to pay off said execution, and the return of said officer, of no corporation property, shall be sufficient proof of the same, it shall be the duty of said officer next to levy said execution on the individual property of any stockholder or stockholders, and sell the same until an amount is raised sufficient to pay off said execution, each stockholder only to be liable for the whole indebtedness of the bank in proportion to the amount of his stock, and that any stockholder who pays off any such execution, or part thereof, shall have the right to use and control the same *f. fa.* against all the other stockholders, so as to collect the ratable share out of each of them." The 18th section of the charter further declares "that those who were stockholders of said bank at the time a list of the stockholders was advertised next before the failure of said bank to redeem its notes on demand, shall be held, considered and taken, as stockholders at the time of such failure, and shall be liable as stockholders according to the provisions of this act, and shall be liable to execution according to the provisions of this act." The several grounds of equity, as alleged in the complainant's bill and the amendments thereto, are very loosely stated, many of them upon information and belief only. The answers of the defendants and the affidavits in support thereof, deny all the material allegations on which the complainant's equity is based, even if the same were sufficient, in view of the terms of the charter of the corporation of which he was a stockholder, to have entitled him to any relief as against the defendant's executions.

1. By the terms of the charter, a judgment against the bank was binding on the complainant as one of the stockholders therein, and it appears from the evidence in the record that he had notice of the suits pending against the bank and declined to make any defense thereto, he therefore, in contemplation of

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the law and the provisions of the charter, has had his day in court, so far as the defendants' judgments are concerned. As to the alleged agreement made with William Dougherty, Esq., it does not appear that he represented the present defendants at that time, but represented other parties.

2. In regard to the proposition made by the complainant's solicitor to the defendants' solicitor, in January, 1873, for a compromise and settlement of defendants' claims then in suit, the proposition made was to pay \$2,000 00 if defendants would procure a receipt signed by *all* the interested parties, bill holders and judgment creditors. To this proposition the defendants' solicitor replied that he had seen Colonel Akerman, who said his clients would accept the proposition, "and I say my clients will; you may so inform your client." This correspondence commenced in January, and the reply accepting the proposition is dated 1st of March; the judgments were obtained in May thereafter. The complainant alleges that he was misled by this correspondence, and failed to make his defense as he otherwise would have done. It does not affirmatively appear by the complainant's allegations what special grounds of defense he had to the defendants' suits; at least, the same is not alleged with sufficient distinctness to show that he had any legal or valid defense thereto. But the complainant never paid the \$2,000 00, or tendered it in payment. The proposition made by the complainant to the defendants for a compromise and settlement, though accepted by the latter, was not *executed* by the former by the payment of the money, and therefore the complainant has no reasonable or equitable ground of complaint, that the defendants took their judgments against him in May. The complainant knew that the money that the defendants had consented to accept, in pursuance of his proposition made in January, had not been paid; in other words, that the agreement to compromise the defendants' claims had not been *executed* on his part by the payment of the money: Code, sec. 2881.

3. In relation to the transfer of the assets of the bank, of which the complainant complains, it appears that the bank

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made an assignment of its assets for the benefit of its creditors in 1866; that H. D. Cothran, the assignee of the bank, who was the complainant's representative, (he being one of the stockholders therein,) had applied a portion of the assets to the purchase of the bills of the bank, amounting to the sum of \$56,392 00, and had paid some other claims against the bank, including attorney's fees and other expenses. Afterwards, the defendants and other bill holders filed a bill in the district court of the United States against the bank, the assignee thereof, *et al.*, and a decree was rendered by said court in May, 1872, adjudging and decreeing that the present defendants, W. M. & R. J. Lowry, and the other bill holders named therein, do recover of H. D. Cothran, assignee of the Bank of the Empire State, the assets now in the hands of said assignee, to-wit: (describing the same,) to be distributed among them in proportion to the amount of their respective claims, and that said assignee, on complying with said decree, is hereby fully discharged and acquitted from any and all liability in consequence of having been assignee of said bank. The bank of which the complainant was a stockholder having been a party to this decree, it is binding upon him unless it can be successfully attacked for fraud, of which there is no sufficient allegation in complainant's bill. The defendants admit, in their answer, that they have received from their share of the assets of the bank, turned over to them under said decree of the district court, the sum of \$790 00, which has been credited on their executions against the complainant, and express their willingness to credit any other amount they may receive from said assets thereon, though they allege that the balance of the assets are worthless, except the Floyd county bonds, which, at the time of filing their answer, they allege were in litigation in the courts as to the liability of the county to pay the same. It appears from the record that the entire indebtedness of the bank is about the sum of \$60,000 00; that the complainant was the owner of two hundred shares of its stock, for which he is liable to the bill holders thereof as such stockholder. The defendants having received their *pro rata* share of the

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assets of the bank in kind, including the Floyd county bonds, which are not alleged to be worthless, but so far as the record shows, are entirely solvent at the present time, it is the equitable right of the complainant to have the amount of the same, if solvent, credited on the defendants' executions against him. We therefore direct that the chancellor below hear evidence by affidavit as to the solvency of said bonds received by the defendants under the decree of the district court, on reasonable notice being given to the parties, or their solicitors, and if the same shall be shown to be solvent, then the amount thereof to be credited on the executions of the defendants against the complainant, and that being done, the injunction is then to be dissolved, leaving the complainant's bill to remain in court.

Let the judgment of the court below be reversed, with instructions as indicated in this opinion.

WILLIAM HARRISON *et al.*, executors, plaintiffs in error, vs.
SOLOMON D. BELTON, next friend, *et al.*, defendants in error.

This being a case arising out of the same judgment of the circuit court—which was excepted to and reversed in *Tennille vs. Phelps et al.*, 49 *Georgia Reports*, 582—the judgment of reversal then pronounced necessarily operates as a reversal as to the parties to this bill of exceptions.

Equity. Before Judge KIDDOO. Quitman Superior Court.
May Term, 1873.

The judgment sought to be set aside by the writ of error in this case, was reversed at the last term of this court in the case of *William M. Tennille vs. Lucy Phelps et al.* Any further report is therefore unnecessary.

B. S. WORRILL, for plaintiffs in error.

JOHN T. CLARKE, for defendants.

Brieswick *et al.* vs. The Mayor, etc., of Brunswick.

TRIPPE, Judge.

When this case was called, counsel for plaintiff in error stated and admitted that the judgment in the case of *Tennille vs. Phelps et al.*, rendered at the last term of this court: 49 *Georgia*, 532, necessarily called for a reversal of the judgment in this case, and it is so ordered.

Judgment reversed.

ROBERT BRIESWICK *et al.*, plaintiffs in error, vs. THE MAYOR AND CITY COUNCIL OF THE CITY OF BRUNSWICK, defendant in error.

1. The power to punish offenders against its ordinances by fine or imprisonment, conferred upon a municipal corporation, does not include the authority to coerce the payment of a fine by imprisonment.
2. Where the title to an act is "to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned," and it contains a provision to make valid and confirm "all the ordinances of the Mayor and City Council of the city of Brunswick heretofore passed, and not in conflict with the constitution of the state of Georgia or of the United States:"

Held, that it was just such legislation as this which the constitution intended to prohibit, when it excluded more than one subject matter from being embraced in the same law.

Municipal corporations. Fines. Constitutional law. *Habeas corpus*. Before Judge HARRIS. Glynn Superior Court. May Term, 1873.

For the facts of this case, see the decision.

W. WILLIAMS; R. L. JOICE; M. L. MERSHON, by brief, for plaintiffs in error.

S. C. DEBRUHL, by S. D. McCONNELL, for defendant.

WARNER, Chief Justice.

It appears from the record and bill of exceptions in this case, that Robert Brieswick and Cyrus Shelton, two boys un-

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der fourteen years of age, were imprisoned in the guard-house of the city of Brunswick; that they were brought before the judge of the superior court on a writ of *habeas corpus*, on the allegation in their petition therefor, that their imprisonment was illegal. The court, after examining into the cause of their capture and detention, on the return of the *habeas corpus*, discharged them from the custody of the officer who had them in charge. They were again arrested and imprisoned in the guard-house of said city, and again brought before the judge of the superior court on a second writ of *habeas corpus*, on the return of which it appeared by the answer of the guard-house keeper, that he detained them in custody by virtue of a warrant of commitment issued by the mayor of said city, dated the 4th of June, 1873; the order of discharge for the same alleged offense being dated 23d of May, 1873. The warrant of commitment recited that the defendants had been found guilty on the 23d day of May, 1873, of violating an ordinance of the city "to prevent persons from indecently exposing themselves or others," and sentenced to pay a fine of \$5 00, or in default thereof to be confined in the guard-house ten days, and each having failed and refused to pay said fine, respectively; and whereas, the said Shelton and Brieswick have been confined by you in said guard-house for the space of three days; these are therefore to command you to secure the bodies of the said Shelton and Brieswick and keep them, and each of them, in the guard-house seven days from the date of their reception. There does not appear to have been any warrant issued for their arrest, founded on the affidavit of any person, but simply a notice served upon them, signed by the city marshal, requiring them to appear before the police court, stating that they were charged with the offense of "bathing at a wharf known as the Cotton Press." On hearing the second *habeas corpus* the court refused to discharge them, and remanded them to be imprisoned; whereupon the defendants excepted. In view of the facts disclosed by the record in this case, it may well be doubted whether the two boys who were arrested and imprisoned, were not deprived of

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their liberty without due process of law: See Code, sections 4714, 4715, 4723, 4724, 4725. There was no affidavit made by any person charging them with having violated any ordinance of the city prior to their arrest and detention. They were simply notified to appear before the police court as being charged with "bathing at the wharf known as the Cotton Press." They were charged with and imprisoned, for having committed the offense jointly, whereas, the offense was not joint, but several as to each one of them. The warrant of commitment recites that they were found guilty of violating an ordinance of the city "to prevent persons from indecently exposing themselves or others." The first section of the ordinance of the city, number eighty-five, prohibits any person from *wilfully* making any indecent or public exposure of his or her person, or of any other person. The second section of said ordinance prohibits any person from swimming or bathing in the river opposite the city, at any place below or south of the mouth of the canal, between daylight in the morning and eight o'clock in the evening, except in bath-houses, or in bath dresses. These two sections recognize two distinct offenses, to-wit: *wilfully* making an indecent or public exposure of the person, swimming or bathing at certain described points, except in bath-houses or in bath dresses. For which offense were the two boys imprisoned? The notice states that they were charged with the offense of "bathing at the wharf known as the Cotton Press." The Mayor's warrant of commitment recites that they were found guilty of violating the ordinance which prohibited an indecent exposure of themselves. The Mayor's warrant of commitment also recites that the boys had been found guilty of that offense, and sentenced to pay a fine of \$5 00, or, in default thereof, to be confined in the guard-house ten days; that appears to have been the judgment of the court, but the Mayor further recites that as they had been confined three days in the guard-house, they were to be imprisoned only seven days. Under what judgment of any court did the Mayor derive his authority to imprison the boys for seven day? The judgment of the court under which he

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pretended to act was that they should be imprisoned ten days, and that was the only judgment under which he had any pretence of authority to imprison them at all. The three days' imprisonment, for which he undertook to give them credit, was declared by the judge of the superior court to have been illegal.

1. But we place our judgment in this case on the ground that the imprisonment of the boys was illegal, because the police court of the city of Brunswick had no power or authority conferred upon it by its charter to coerce the payment of the fine imposed by imprisonment. The act of 27th August, 1872, consolidating and amending the several acts incorporating the city of Brunswick, provides, by the 38th section thereof, that the police court shall have cognizance of all offenses against the ordinances, by-laws, rules and regulations of said city, and the laws of this state touching said city, with power to inflict the proper punishment by fines, imprisonment, labor, or other penalty prescribed by such ordinances, by-laws, rules and regulations, from time to time, and to enforce the same by *militia*, directed to the chief marshal of the city, or any lawful constable thereof, or to the keeper of the guard-house, when necessary. The police court of the city, under its charter, had the power and authority to have inflicted punishment by imposing the fine prescribed by the ordinance for its violation, but did not have the power and authority to coerce the payment of such fine by the imprisonment of the party or parties on whom such fine was imposed. The city council have the power, under its charter, to prescribe the punishment for a violation of the ordinances of the city, either by fine or by imprisonment. When the punishment inflicted is imprisonment, that is the penalty to be enforced. When the penalty is a fine, that is the penalty to be enforced in the manner provided by law; but the charter does not confer upon the city council of Brunswick the power and authority to pass an ordinance to enforce the collection of a fine by imprisoning the party who fails to pay it until he shall do so, or for any specified number of days until he shall do so. The city council have

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the power and authority to pass an ordinance inflicting the proper punishment by imprisonment for a violation of its ordinances, but have not the power and authority, under its charter, to pass an ordinance to enforce the collection of a fine by imprisonment, or to imprison any person for the *non-payment of a fine imposed on him.*

2. The 58th section of the act does not help the matter. By the 4th section of the 3d article, paragraph 5 of the constitution of 1868, it is declared: "Nor shall any law or ordinance pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The only subject matter referred to in the title of the act, is "to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned." The other subject matter contained in the act, is to make valid and confirm "all the acts and ordinances of the Mayor and City Council of the city of Brunswick, heretofore passed, and not in conflict with the constitution of the state of Georgia or of the United States," whether these acts and ordinances had been authorized by, or were in conformity with, the laws of this state or not. The 58th section of the act, it will be perceived, introduces into the body of it a distinct and quite comprehensive subject matter, embracing all the ordinances of the city which had theretofore been passed. Did the general assembly understand when the act to consolidate and amend the several acts incorporating the city of Brunswick was passed, that the other subject matter embraced in it, of confirming and making valid all the acts and ordinances of the Mayor and City Council of Brunswick, was also made a part of that law? Did the general assembly have before it these ordinances which were confirmed and made valid by that act? Did it know and understand what were the several provisions of these ordinances? It was just such legislation as this that the constitution intended to prohibit when it excluded more than one subject matter from being embraced in the same law. It was intended to prevent surprise, decep-

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tion and fraud, by covertly inserting into the act a distinct subject matter, not referred to in the caption of the act.

Inasmuch as it appears on the face of the record that the two boys were imprisoned because they did not pay the fine of \$5 00 imposed on them, respectively, their imprisonment was illegal, and the court erred in not discharging them.

Let the judgment of the court below be reversed.

THE WESTERN AND ATLANTIC RAILROAD COMPANY, plaintiff in error, vs. **ALEXANDER J. DRYSDALE**, defendant in error.

1. Pain and bodily suffering, resulting from a *tort* to the person, may be considered by the jury in estimating damages.
2. Where the jury may, from the evidence, reasonably find that there was any aggravating circumstances, such as gross negligence in the act whereby the injury was inflicted, they may increase the damages beyond a mere compensation for the injury done; and in such a case, where the judge who tries it, refuses a new trial, the damages given must be grossly excessive before this court will interfere.

Damages. Railroads. Before Judge HOPKINS. Fulton Superior Court. April Term, 1873.

Drysdale brought case against the Western and Atlantic Railroad Company for \$25,000 00 damages for injuries to his person, and for \$500 00 for expenses of nursing. The declaration alleged that on October 5th, 1871, the defendant, a common carrier, contracted, for a valuable consideration, to transport him from the town of Marietta to the town of Dalton; that he entered a passenger coach of said defendant, at the point first aforesaid, for the purpose of being transported as stated; that he attempted to shut the window near which he was sitting, when a freight train passed him on a side-track, going in an opposite direction, and a standard on a lumber car struck his left arm and broke it between the elbow joint and the shoulder; that he was confined to his bed for thirty days, compelled to expend money for attention, etc.;

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that the injury was caused by the defendant's negligence in not having the standard in an erect position, but leaving it inclined.

The defendant pleaded the general issue. The evidence made, in substance, the following case:

Plaintiff was an Episcopal clergyman. In October, 1871, he and his family embarked on the train of the defendant at Marietta, for the purpose of being transported to Dalton. As the train was moving off he was in the act of shutting a window, and as a freight train, which was standing on a side-track, was passed, a standard on a lumber car attached to said last mentioned train, struck his arm and broke it immediately above his elbow. The evidence was somewhat conflicting as to whether his arm projected out of the car window, but there was nothing to show that he was not attempting to close the window in the ordinary and customary manner. The evidence was also somewhat conflicting as to whether the standard struck the passenger coach at any other point except where the defendant was sitting, though the preponderance seemed to show that it scraped along the length of the car. The plaintiff was traveling on a clergyman's half-fare ticket. Was confined to his bed ten or twelve days, and prevented from attending to his usual duties for eight weeks. Went to work earlier than his physician advised, and suffered great inconvenience and pain from time to time, for six or eight months, not being able to take off or put on his clothes. He had not, at the time of the trial, the full use of his arm. Was paid at the rate of \$1,400 00 per annum. Was employed by the Bishop of the Episcopal Church.

The jury found for the plaintiff \$3,000 00. The defendant moved for a new trial upon numerous grounds, and amongst them, because the damages assessed by the verdict were excessive. The motion was overruled, and defendant excepted.

B. H. HILL & SON; JULIUS L. BROWN, for plaintiff in error.

L. J. GLENN & SON; S. D. McCONNELL, for defendant.

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TRIPPE, Judge.

1. One point made in the argument was, that in estimating damages in the case of a *tort* to the person, the jury could not consider the pain and bodily suffering endured by the party injured. This question we consider was settled in *Cooper vs. Mullins*, 30 Ga., 146. It is stated in that decision, as the correct rule, that "surely there ought to be some compensation for the *suffering* endured." There may be, and often are, injuries where there are intense pain and great bodily suffering, which may last for a considerable time, and but very little, if any, pecuniary damages, and all caused by the grossest negligence of the defendant. Any one can easily imagine such. We did not consider it an open question as to the right of the jury to consider this in fixing the damages: See *New I. R. R. vs. Kennors*, 21 Pa., 203.

2. Are the damages given in this case excessive? There can be no question but that the negligence of those who were in charge of both trains was gross. The lumber train which ran against the passenger train, or rather struck the passenger train as it passed, had a car loaded with lumber, with a standard so forced out of an erect position that it reached to the passenger train, and broke the defendant's arm as it went by. The agent in charge of the freight train had observed the standard, but thought the cars could pass. They did pass, but at the imminent hazard of those in the passenger train, and to the great hurt and damage of defendant in error. There was such want of care and prudence on the part of this agent, as to make it a case of gross negligence, and the fact that the officers on the passenger train did not observe the inclined standard, or if they did, that they permitted those under their care to be thus endangered, strengthens this view. Section 3066 of the Code says, "in every *tort* there may be aggravating circumstances, either in the *act* or the intention, and in that event the jury may give additional damages," etc.: See, also, *Ga. R. R. and Banking Co. vs. McCurdy*, 45 Ga., 288. The judge who tried the case did not

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think the verdict should be set aside on this ground, and we cannot say he abused his discretion.

Judgment affirmed.

LAWTON & WILLINGHAM *et al.*, plaintiffs in error, vs. MARTHA E. FISH, executrix, defendant in error.

1. When legatees take the individual note of the executor, secured by mortgage on his individual property, in discharge of their legacies and receipted him therefor, as executor, the debts lose their fiduciary character.
2. As the evidence authorized the master to find that the policy of insurance in controversy, was the property of the widow and not the property of the estate, the decision of the chancellor, to whom the issues formed upon the exceptions to the report of the master were submitted without the intervention of a jury, will not be interfered with.
3. Where the testator died in the month of February, 1871, after he had employed hands and made all the necessary arrangements for running his plantation, and the executrix continued the business for the balance of the year, without an order from the court of ordinary, at a loss of \$2,700 00, the chancellor committed no error in sustaining the report of the master allowing her a credit to that amount.

Administrators and executors. Legacies. Distribution. Debtor and creditor. Before Judge CLARK. Macon county. At Chambers. November 21st, 1873.

This case is fully reported in the decision, with the following statement:

The third exception was that the master decided that the policy of insurance for \$5,000 00 was not a part of the estate of G. W. Fish. The report upon this point was as follows:

"Mr. Fish was killed February 28th, 1871, and left his widow, the complainant in this bill, his executrix. His life was insured in the Cotton States Life Insurance Company for \$5,000 00. This policy was made payable to his executors and administrators. Mrs. Fish filed a bill, not as executrix, but in her individual capacity, alleging that the policy should

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have been made payable to her, for herself and children, and was made payable to the administrators and executors of Mr. Fish by mistake. The creditors of Mr. Fish were not made parties to the bill. The creditors now ask that the decree rendered on this bill in Bibb Superior Court, reforming the policy and making the said policy payable to Mrs. Fish, should be set aside, and the amount of \$5,000 00 be declared assets in the hands of Mrs. Fish, as executrix. I do not think that sufficient proof has been offered to authorize this to be done. Indeed, the interrogatories of Mr. Obear, produced by the creditors, show that a mistake was made in issuing the policy, by the officers of the company, and should, in accordance with the application originally made, have been made payable to Mrs. Fish, and I cannot presume that the decree would have been rendered without sufficient testimony, and I therefore refuse in this, my report, to make or consider the \$5,000 00 arising from the policy, assets to be distributed."

W. A. HAWKINS ; COOK & CRISP, for plaintiffs in error.

POE, HALL & LOFTON, for defendant.

WARNER, Chief Justice.

This was a bill filed to marshal the assets of the estate of G. W. Fish, deceased, by the executrix of his last will and testament, Martha E. Fish. At the May term, 1872, of Macon superior court, an order was taken referring the matters embraced in the aforesaid bill to N. A. Smith, master in chancery, with power to hear and determine all questions of law and fact, with the right of all parties to amend their pleadings, establish their claims, and to make a report at the next term of the court. The master, after hearing the evidence offered by the respective claimants to the fund belonging to the estate and considering the same, made his report to the court, when it was agreed that the parties should have thirty days to except to the master's report, and that the presiding judge should decide upon the report and exceptions thereto,

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embracing all questions of law and fact, without the intervention of a jury. Lawton & Willingham *et al.* excepted to the master's report: First, because the master refused to allow the claim of Lawton & Willingham, who claimed to have paid two of the legatees of William Fish, the father of G. W. Fish, their shares of William Fish's estate, and that G. W. Fish being the executor of his father, his estate was chargeable with the payment of the debt due the legatees thereof as a trust debt, and that they were entitled to be subrogated to the rights of the legatees of William Fish; second, because the master decided that the widow of G. W. Fish was entitled to dower in the Montfort lands; third, because the master decided that the policy of insurance for \$5,000 00 was not a part of G. W. Fish's estate; fourth, because the master decided that the executrix was entitled to a credit of \$2,700 00 for losses in carrying on the plantation for the balance of the year after testator's death, as a part of the expenses of administration; fifth, in allowing the executrix \$1,000 00 for counsel fees in the management of the business of the estate. The executrix also excepted to the master's report because he charged the amount awarded to her, with eighteen per cent., as her share of the expenses of administration. The court, after considering the exceptions, confirmed the master's report, and the contestants excepted.

1. It appears from the evidence in the record had before the master, that G. W. Fish, as the executor of his father, William Fish, had in his hands the legacies due to D. A. Fish, and Williams, in right of his wife, that they had a settlement with G. W. Fish, as executor of William Fish, and took from him his individual notes for the amount due them, secured by a mortgage on his individual property, they receipting him for the amount due them as executor. Afterwards G. W. Fish sold the lands mortgaged to Lawton & Willingham, who, to protect their title, were compelled to pay off the mortgage to Fish and Williams, amounting to the sum of \$3,500 00, and claimed that this was a trust debt due by G. W. Fish, as executor of his father, to D. A. Fish

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and Williams, and that they having paid it were entitled to be subrogated to their rights against the estate of G. W. Fish. If the debt due by G. W. Fish to D. A. Fish and Williams was not a trust debt, then Lawton & Willingham occupy no better position in respect to its priority of payment than they would have done. Was the debt due by G. W. Fish to D. A. Fish and Williams a trust debt due by him, as executor, or had it lost its fiduciary character and become the individual debt of G. W. Fish? In our judgment, when D. A. Fish and Williams took the individual notes of G. W. Fish, secured by a mortgage on his individual property, in discharge of the debt due by him, as executor, and receipted him therefor, as executor, the debt lost its fiduciary character and became the individual debt of G. W. Fish, and there was no error in overruling this exception to the master's report: *Lattimer vs. Sayre*, 45 Georgia Reports, 468; *Coleman vs. Davis*, *Ibid.*, 489.

2. In relation to the widow's right to dower in the Montfort land, the question does not appear to have been directly decided by the master in his report, and we express no opinion in relation to it, as it was not seriously urged on the argument. The evidence in relation to the policy of insurance was admitted before the master without objection; indeed, it was offered by the plaintiffs in error, and from that evidence the master was authorized to find and decide that the policy was the property of the widow and not the property of the estate for distribution.

3. As to the master allowing the executrix a credit of \$2,700 00 for losses sustained in carrying on the plantation, the undisputed facts are, that the testator died on the 28th of February, 1871, after he had employed hands and made all the necessary arrangements for running the plantation for that year, and she, as executrix, continued the business for the balance of that year. It is not disputed that the loss amounted to the sum claimed, nor is it pretended that the loss was occasioned by the misconduct or mismanagement of the executrix, but from causes beyond her control. But it is insisted that

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because she carried on the business of the plantation for the balance of the year, under the circumstances as before stated, as executrix, without an order from the ordinary, that she is not entitled to any credit for the losses actually sustained. The executrix did not commence the planting business for that year, as executrix, but it was commenced by her testator, and was in progress at the time of his death, and upon her qualification she continued it for the balance of the year, as any prudent, discreet person would have done, for the protection of the interest of the estate. If the seasons had been propitious, and a good crop had been made, the estate would have received the benefit thereof; but as a different result happened, without the fault of the executrix, she ought not to be made chargeable with the loss sustained, on the statement of facts disclosed in the record. We think the allowance of \$1,000 00 for counsel fees was too much, but we cannot say that it was so grossly extravagant, under the evidence before the master, as will authorize this court to interfere and control it under the previous rulings of this court in similar cases. Executors, administrators, and other trustees, in making contracts for counsel fees for the benefit of the estates they represent, should exercise the same care and prudence as an ordinarily prudent and careful man would exercise in making similar contracts for the benefit of his individual interest; and when no contract is made the attorney is only entitled to recover for the services *actually rendered*. In regard to the exception filed by the executrix to the master's report, we express no opinion, inasmuch as her counsel are content to abide the judgment of the court affirming the master's report on the other exceptions taken thereto by the plaintiffs in error, and do not desire a reversal on her exception.

Let the judgment of the court below be affirmed. •

INDEX.

ACCOMPlice. See *Criminal Law*, 36, 37.

ACCOUNT. See *Evidence*, 9 ; *Witness*, 5.

ACKNOWLEDGMENT OF SERVICE.

See *Service*, 3.

ACTIONS. See *Service*, 4.

ADJOURNED TERM. See *Criminal Law*, 28.

ADMINISTRATORS AND EXECUTORS.

1. A testator who died in 1863, bequeathed \$3,000 00 to his executor in trust for three of his grand-children. The bequest was to be "set aside as soon as the debts and expenses were paid." The balance of his estate was given to his son (the executor,) and to his daughter, Mrs. Flannegan. The grand-children filed their bill against the executor for their legacy, alleging that he and Mrs. Flannegan, after paying the debts, divided the land and negroes between them in November, 1863, and that such a division was a *devastavit* on the part of the executor. The bill did not waive discovery. The executor answered that the debts of the estate had not been paid at the time of the alleged division ; that the creditors would not receive Confederate money ; that he would not sell property to raise the \$3,000 00 for the grand-children, in Confederate money, and on account of the war and the condition of the country, he and his sister, the other residuary legatee, did, in November, 1863, divide the land and negroes between them as a temporary arrangement, on the express agreement and understanding that the title should not pass, but the same was to be held subject to the debts of the estate and legacy of complainants, until a suitable time should arrive when a sale could be effected for good money ; that it was so held until after the war, and in

- 1866 the land was regularly sold by him, as executor, and for full value. By amendment to the bill, Mrs. Flannegan, Harmon and Willis, who had purchased the land, were made parties, and a decree was prayed against them, that their deeds should be canceled and the land declared subject to complainants' legacy:
Held, that the arrangement made by the executor with the other residuary legatee, at the time and under the circumstances it was done, was not such an appropriation of the assets of the estate as to make him liable for the same as for a *devastavit*. The possession of the land having been resumed by the executor, and the same regularly sold in 1866, the proceeds of the sale was subject to administration for the purpose of paying debts and legacies; and as there is no contest that the land did not sell for its value, it cannot be again made liable to the same claims. *Ferguson vs. Ferguson et al.* 340
2. An administrator *de bonis non* can sue a creditor of an insolvent estate for the recovery of what may have been paid him by a former representative of the estate, beyond such creditor's *pro rata* share of the assets.
McFarlin, adm'r, vs. Ringer et al. 363
3. As it appears doubtful from the record what was the amount of assets in the hands of the present representative for the payment of debts, and the inventory returned by him showing, without further explanation than is contained in the evidence, that a larger credit should have been allowed the defendant below than the jury gave him, we do not think the court erred in granting a new trial; nor do we feel authorized under the evidence to order any specific amount to be remitted from the verdict. *Ibid.*
4. A plea to an action by an administrator, on a note given him for land bought by the defendant at administrator's sale, that the heirs-at-law were alone interested in the note, and that after the sale the heirs-at-law had brought suit against the defendant for the land, and put him to great expense in defending the suit, is not a good plea in defense of the suit on the note, and it was not error in the court to strike it on demurrer.
Story vs. Kemp, adm'r 399
5. Where an unmarried woman was administratrix of an estate, and being sued as such, filed a plea of *plene ad-*

ministravit, and pending the suit she married and her letters abated, and her husband took out letters *de bonis non* on the estate, and was made a party, and he also filed a plea of *plene administravit*, and a general judgment was had for the plaintiff:

Held, that no right of the wife was affected by the verdict. *Badkins vs. Mehaffey* 450

6. Where a judgment creditor of an estate served a summons of garnishment against A, as the debtor of said estate, and A, in his answer, admitted that he had bought property at the estate sale, and gave his note to the administrator, but set up that the note had, before the service of the summons, been handed over by the administrator to a third person in payment of a judgment of the highest dignity against the estate, and that said note was still the property of said third person :

Held, that on the trial of an issue traversing this answer, it was not competent for the judgment creditor to introduce evidence to show that in the original suit between him and the administrator, it was one of the issues whether this particular note was not then in hand as assets for the payment of the plaintiff's debt, and that said issue had been found in his, the plaintiff's favor, it not appearing that either the garnishee or the person claiming the note, was a party to said issue. *Ibid.*

7. When, in a suit pending against an administratrix, there was no issuable plea filed, and the plaintiff took a judgment against the administratrix personally, and at a subsequent term of the court, moved that the judgment be set aside, and that he be permitted to take, *nunc pro tunc*, a judgment against the administratrix, as such, and it was made to appear to the court that since the original judgment, and only a short time before the application was made, the administratrix had discovered that the note sued on was not the act and deed of the intestate, and that she wished to file a plea of *non est factum* to the same:

Held, that under the facts, the court erred in allowing the plaintiff to take his judgment *nunc pro tunc*. *Emory, ex'r, vs. Smith* 455

8. A decree rendered against the defendant in a bill, with the word "executor" added to his name, without more,

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- binds his personal goods and chattels. *Tinsley et al. vs. Lee*..... 482
9. The addition of the word "executor" to the defendant's name in the execution is a mere irregularity, which would not affect the purchaser's title. *Ibid.*
10. An action having been brought against the defendants, as executors, charging their testator as an executor *de son tort* of the father of the plaintiff, with having appropriated the rents and profits derived from a certain lease belonging to said father's estate, and seeking to render them liable for double the value of the same; to allow a count to be added seeking to render the defendants liable on a breach of covenant for quiet enjoyment contained in said lease, would be to authorize an amendment introducing a new and distinct cause of action. *Matthews vs. Woolfolk et al., executors*..... 618
11. When legatees take the individual note of the executor, secured by mortgage on his individual property, in discharge of their legacies and receipted him therefor, as executor, the debts lose their fiduciary character. *Lawton & Willingham et al. vs. Fish, executrix*. 647
12. Where the testator died in the month of February, 1871, after he had employed hands and made all the necessary arrangements for running his plantation, and the executrix continued the business for the balance of the year, without an order from the court of ordinary, at a loss of \$2,700 00, the chancellor committed no error in sustaining the report of the master allowing her a credit to that amount. *Ibid.*

See *Distribution*.

ADVANCEMENT.

1. The grand-child of an intestate, whose father died before the grand-father, takes an interest in the estate of the intestate, subject to the advancements made to the father of such grand-child. *Bransford, adm'r, vs. Crawford*..... 20
2. The declaration of such intestate, that certain notes which he held on his son, were not held by him as debts against his son, but as advancements to him, are admissible in evidence in an action by the grand-child for her share in the grand-father's estate. *Ibid.*

3. Where a testator stated in his will that he held certain notes on a legatee which he was to pay into his estate, and after the death of said testator, the legatee, who had become executor of said will, produced a receipt for a large sum of money signed by the testator, stating that the amount therein mentioned was to be credited on the notes held by him, it was error for the court, on the trial of a bill for account filed against said executor by the other legatees, to charge the jury that if they should find the notes extinguished by the receipt, that the said executor should account for the same as an advancement. The question was whether said notes were extinguished during the life of the testator? If they were not, they could pass under the will; otherwise, they could not. The question of advancement was not involved. *Thrasher, ex'r, vs. Anderson et al.* 542

AMENDMENT.

1. In this case the objection to the summons of garnishment, on the ground that it is double, may be cured by amendment; the requirement in the summons that the garnishee shall answer what he owes the principal debtor, is the substance of the proceeding, and the addition requiring him to answer what he owes the firm is surplusage, and may be stricken out, if objected to. *Branch, Scott & Company vs. Adam, Smith & Company* 113
2. It is not necessary that a defendant should make an affidavit of any sort for the purpose of amending his answer, unless in the case of a sworn answer to make oath to the amendment, *Ferguson vs. Ferguson, ex'r, et al.* 340
3. In an action upon the case against a railroad company, it was charged in the declaration that the defendant had stopped and dammed up a stream of water with an embankment, and caused a pond of water to accumulate and remain, and that thereby the plaintiff's family had been made sick, and he had been put to great expense and loss of time, etc. On the trial it was proposed to amend the declaration, and charge that defendant had thrown up an embankment in altering the locality of its road-bed, and had, in so doing, turned up and exposed to the sun and air, earth that had before been unexposed, and had thus produced malaria and

- caused sickness in the plaintiff's family, etc. The judge refused to allow the amendment, and there was a verdict for the defendant, and a motion for a new trial on various grounds. The judge granted the new trial on the ground that he erred in refusing the amendment, but overruled the motion on the other grounds:
Held, that the amendment was properly refused. It was a new cause of action, and under section 3480 of the Code, an amendment introducing a new cause of action is not allowable. *Central Railroad and Banking Company vs. Wood*..... 515
4. Where a plaintiff, who sues out a summons of garnishment, signs the partnership name of which he is a member, as surety to the bond required by law, and his partner is present consenting thereto, and afterwards comes into court and ratifies the same under seal, and proposes to substitute his signature for that of the firm:
Held, that the amendment to the bond should have been allowed, and whilst we are strongly inclined to the opinion that the bond was binding on the partner individually who thus consented to the signing, we are satisfied it was error to refuse the amendment and to dismiss the garnishment. *Cunningham, assignee, vs. Lamar*..... 574
5. An action having been brought against the defendants, as executors, charging their testator as an executor *de son tort* of the father of the plaintiff, with having appropriated the rents and profits derived from a certain lease belonging to said father's estate, and seeking to render them liable for double the value of the same; to allow a count to be added seeking to render the defendants liable on a breach of covenant for quiet enjoyment contained in said lease, would be to authorize an amendment introducing a new and distinct cause of action. *Matthews vs. Woolfolk et al., ex'res*..... 618

APPRENTICE.

- The superior court has jurisdiction of an action brought for the breach of an indenture of apprenticeship executed under the provisions of the act of 1865-6. *Tritt vs. Bize*..... 494

APPROPRIATION OF PAYMENTS.

1. When a factor holds two claims on his debtor, and has received cotton consigned to him on account of said claims, which he sold for an amount sufficient to discharge what is legally due on both, and no application of the money has been made to either of the claims, the jury may, on the trial of a suit on one of the debts, where payment is pleaded, apply enough of the amount so received by the creditor to discharge the debt on which the suit is founded. *Eason et al. vs. Saulsbury, Respass & Company*..... 507
2. The debtor may prove what is legally due and collectible on both debts on account of usury, in order to show that the creditor has received a sufficient amount to discharge both. *Ibid.*
3. If it appear in evidence that separate actions are pending on both claims, and an issue be made by plea and proof as to the amount due on the debt involved in the case on trial, the jury should, even if the verdict be for the defendant, state the amount they find due on the debt, so that on the trial of the other the record may show how much of what was received by the creditor has been applied to its payment. *Ibid.*

ARBITRAMENT AND AWARD.

1. When a bill was filed to enforce an award, and the defendant set up that the award was the result of a mistake on the part of the arbitrators, setting out in his answer the evidence introduced at the hearing, and the plaintiff replied that there was other evidence before the arbitrators:
Held, that whether such evidence was in fact before the arbitrators, was a question of fact for the jury. *Thrasher vs. Overby et al.*..... 91
2. If, upon an examination of a brief of the evidence upon which an award is founded, and upon a hearing of the testimony of the arbitrators, it appears that the award is founded upon a mistake upon a material point, as that a certain item of an account has been twice charged against one of the parties, the award should be set aside and the jury proceed to decree as to the real rights of the parties. *Ibid.*
3. An indorsement, amongst others, on a fire insurance

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- policy, stating that in case of a difference of opinion as to the amount of loss or damage, such difference shall be submitted to arbitration, (although such indorsements are referred to in the body of the policy,) does not bar the insured of his right of action without such submission, unless the same is stipulated to be a condition precedent to his right to resort to the courts, or as the only mode by which the loss or damage is to be ascertained, or by which the liability of the company can be fixed. *Liverpool, London and Globe Insurance Company vs. Creightons* 95
4. But if one of the conditions so indorsed and referred to, be that the insurer is not liable for loss or damage by theft, at or after any fire, such stipulation is binding on the insured. *Ibid.*
5. Where a contract between a railroad company and contractors, provided that the chief engineer of the company should be the inspector of the work, and determine when the contract had been complied with; that all disputes and differences should be adjusted by him, and his decision should be conclusive without further recourse or appeal; that should the work, in the opinion of the engineer, not progress in such manner as to insure its completion by the time stipulated, the said engineer, after giving ten days' notice, might proceed to have the work executed by hiring men, or by subcontracting such portions thereof as he might deem necessary to insure its completion, at the expense of the contractors:
- Held*, that said engineer was made the arbitrator of the rights of the parties under the contract, and his decision was as conclusive and binding as the award of any other arbitrator, and could only be attacked for fraud or some other ground of illegality recognized for that purpose. *Grant, Alexander & Co., vs. Savannah, G. and N. A. R. R. Co.* 348
6. A submission by parties litigant of the matters in suit to seven arbitrators to be afterwards chosen by one of the parties, though an order of the court be also taken to that effect, is not a statutory submission, and may be revoked before an award is made. *Cherry vs. Smith.* 558

ATTACHMENT.

1. The plaintiff in an attachment may, by serving the defendant with notice and by the other methods provided by law, get a general judgment against the defendant and his property, but in the distribution of money raised from the sale of property attached, he is still an attaching creditor, and the money is to be divided according to the priorities of the several attachments, to-wit: according to the date of the levies. *Atlantic and Gulf R. R. Co. vs. Florida Construction Co.* 241
2. The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal. *Atlantic and Gulf R. R. Co. vs. Jacksonville, Pensacola and Mobile R. R. Co.* 458
3. An attachment was sued out on an account more than four years after it was due; but the debtor had left the state before the bar of the statute had attached, and has never returned to reside in the state. The defendant pleaded the statute of limitations and other pleas: *Held*, that the defendant having appeared and made defense, the proceedings became a suit as in cases of personal service, and the removal of the defendant from the state operated a suspension of the statute from the time such absence commenced. *Whitman vs. McClure et al.* 590

ATTORNEY.

1. An attorney at law is protected by his privilege from liability on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. *Lester vs. Thurmond* 118
2. It is a good ground for continuance in the superior court, that the attorney who is the party to the case and the sole counsel, is, at the time it is called for trial, engaged as counsel in the argument of an important case in the supreme court, the conflict in the hearing of the two cases being caused by an adjournment of the regular term of this court. *Hill vs. Clark et al., adm'res* 122
3. Where clients authorize their attorney at law to make a certain contract with a party, which is done, and the

- contract is carried out according to the agreement, such authority, thus given, is not a confidential communication by the clients, and the attorney is a competent witness to prove the contract. *Burnside vs. Terry et al.* 186
4. When a jury, on the trial of a criminal case, have retired to consider the verdict, and have been called back by the court to be recharged, it is the right of the defendant to have his counsel present, and he does not lose this privilege unless by a clear and distinct waiver thereof. *Martin vs. The State*..... 567
5. The granting of leave of absence by court to counsel, unless for providential cause, is of doubtful propriety when it affects the rights and interests of other parties, and should be exercised at all times with caution and circumspection by the court. *Ross vs. Head et al.*..... 605
6. In this case, the court having granted the claimant's counsel leave of absence, though the docket did not show him to be of counsel, this court will not control its discretion in continuing the case. *Ibid.*
7. A letter written by the attorney of the plaintiff to the defendant, is not competent evidence for the defendant, on the trial of the case, unless it is shown that it was written by authority of the client. *Cissels, trust., vs. Usry, Sturgis & Co*..... 621

BAIL. See *Principal and Security*, 1, 2.

BANKS.

1. Under the charter of the Manufacturers' Bank of Macon, it had no authority, in the year 1862, to issue bills intended to be redeemed in Confederate treasury notes, and therefore the ordinance of 1865 is inapplicable to such contracts. *Manufacturers' Bank of Macon vs. Ellis*..... 154
2. The bills sued on in this case were issued prior to the passage of the act of November 29th, 1862, authorizing the suspension of specie payment by the banks upon certain conditions, and therefore the defendant can derive no benefit from it. *Ibid.*
3. Under the act of 1869, a garnishee must answer not only what he was indebted, etc., at the date of the summons of garnishment, but also "what he has be-

- come indebted to the defendant, or what property or effects of his he has received or got possession of, belonging to the defendant, between the time of the service and the answer;" and under this rule, if a bank, under summons of garnishment, receives deposits of the defendant, and pays them to his checks, it is liable to the garnishing creditor for the amount deposited up to the time of the filing of the answer. *Mayer & Lowenstein vs. Chattahoochee National Bank*..... 325
4. When A deposits money in a bank, with directions that it is to be paid out to a check which he has given, or will give, to C, the money is still the money of A until the bank either pays it, or promises C to pay it, or unless it be deposited at the instance or procurement of C, or under an arrangement with him. *Ibid.*
5. Where the charter of a bank provides that judgment obtained on its bills may be levied upon the individual property of its stockholders, upon a return of no property being made as to the bank, a stockholder who has had notice of the suit and made no defense thereto, has had his day in court, and cannot set up any defense which might have been made before judgment. *Lorry vs. Sloan*..... 633
6. Suit was pending in favor of the defendants against the Bank of the Empire State, in which the complainant was a stockholder. In January, 1873, complainant wrote to defendants, proposing, as a compromise, to pay \$2,000 00, in full of his liability. This offer was accepted on March 1st. No money being paid, on the 20th of the following May, defendants entered judgments against said bank for \$10,668 32. Executions were issued, and returns of no corporate property to be found, made. They were then levied on the property of the complainant. He sought to enjoin any further proceedings on said executions, because of the aforesaid compromise, and because the bank made an assignment of its assets for the benefit of its creditors in 1866, and the defendants, with other creditors, filed a bill in the district court of the United States against said assignee, and recovered a decree for the assets then in hand. A part of these assets were certain bonds of the county of Floyd, which were in litigation. The complainant alleged that their value had never been credited on the aforesaid executions. The injunction

was granted as prayed for. Subsequently, on the filing of the defendant's answer and affidavits, the chancellor modified said restraining order, so far as to allow the execution to proceed for \$2,000.00:

Held, that the chancellor should hear evidence by affidavits as to the solvency of said bonds received by the defendants, and if the same shall be shown to be solvent, direct that the amount thereof be credited on said executions, and that being done, that the injunction be dissolved. *Ibid.*

BILL OF EXCEPTIONS.

See *Practice in the Supreme Court*.

BILL OF PARTICULARS. See *Liens*, 6.

BOND FOR TITLE.

See *Vendor and Purchaser*, 1, 3, 4, 7.

CARRIERS.

1. Where A, a common carrier, wrongfully and fraudulently takes goods to be conveyed to the owner, knowing that B, another common carrier, has made a contract with the owner for the carriage of the same for hire, the former is liable to the latter in damages to the amount of freight he would have earned under his contract. *Barnett et al., vs. Central Line of Boats...*, 439
2. If the owner of the goods had assigned the bill of lading to B, and the owner refuse to receive them from A, and B demands and receives the goods from A, and then deliver the same to the owner, who accepts them, such carrier so delivering must assert his claim for the freight against the owner. *Ibid.*
3. But if B, in order to obtain possession of the goods, has been compelled to pay A the amount for freight which the owner was to pay him, he is entitled to recover back the same from A. *Ibid.*
4. If the goods, when received by B and delivered to the owner, were damaged so that the owner had a right to recoup for the damages against B's claim for freight, B may recover the amount of the damages from A. *Ibid.*

5. Would B, in this case, by reason of his special property in the goods arising out of the assignment of the bill of lading to him and his lien on the goods for his claim for freight, have a right of action against A for the damages? *Quære.* *Ibid.*
6. There being no evidence in the record showing that defendants in error had any right to claim freight on the coal, or what amount of damages was done to the hay, and they not being entitled to recover from plaintiff in error the amount which was paid for freight from New York to Apalachicola, the verdict is too large, and the judgment is reversed with instructions. *Ibid.*

See *Railroads.*

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CERTIORARI.

Where suit is instituted in a justice court for \$55 00 damages, and the claim as to \$5 00 is abandoned, the right of carrying the case by writ of certiorari to the superior court for review exists.

CHARGE OF COURT.

1. Where there is no error in what the court did charge, or in the refusal to charge the special requests made, and there is no motion for a new trial, this court will not grant a new trial on the ground that the court below failed to charge on certain points which the losing party claims were favorable to him, although under the evidence such further charge would have been proper. *Moye vs. Waters*..... 13
2. A charge unwarranted by the evidence is error. *Eady vs. Wingate*..... 250
Johnson vs. Quin, adm'r..... 289

CHECKS. See *Banks*, 4. *Criminal Law*, 13, 32, 33.

CLERK OF SUPERIOR COURT.

- A private citizen has not a right, against the consent of the clerk of the superior court and without the payment of his fees, to examine the books of record in his office, for the purpose of making a full abstract of the contents thereof, for publication. *Buck & Spencer vs. Collins* 391

COMMENCEMENT OF SUIT. See *Service*, 4

COMMON OF PASTURE.

- The right of common of pasture on wild lands cannot, in Georgia, be founded on the fact that one's cattle have been pastured on such lands for twenty or thirty years. *Davis et al. vs. Gurley*..... 74

COMPROMISE. See *Injunction*, 19, 20.

CONSIDERATION. See *Contracts*, 1.

CONSTITUTIONAL LAW.

1. To make a contract illegal as being in aid of the rebellion, as provided by the 17th section of the fifth article of the constitution of this state, it should be alleged with whom the contract was made, and the terms of it, and that it was made with the intention and for the purpose of aiding and encouraging the rebellion, and the consideration therefor should be alleged, so

- that the court could determine from the facts, whether the contract was made with the intention and for the purpose of aiding the rebellion. *Manufacturers' Bank of Macon vs. Ellis*..... 154
2. Under the constitution of 1868 the general assembly has authority to provide for the trial of misdemeanors in county courts and other inferior tribunals, by juries composed of a less number than twelve jurors. *Allen vs. The State*..... 264
3. Under article 3, section 4, paragraph 5, of the constitution of this state, which declares that "no law shall pass which *refers to more than one subject matter*, or contains matter different from what is expressed in the title thereof," it is not competent for the general assembly to enact a law incorporating three separate and distinct corporations, or reviving by name three charters which had become obsolete. *Ex parte Conner*..... 571
4. Where the title to an act is "to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned," and it contains a provision to make valid and confirm "all the ordinances of the Mayor and City Council of the city of Brunswick heretofore passed, and not in conflict with the constitution of the state of Georgia or of the United States:"
Held, that it was just such legislation as this which the constitution intended to prohibit, when it excluded more than one subject matter from being embraced in the same law. *Brieswick et al. vs. Mayor and City Council of Brunswick*..... 639
- CONTEMPT. See *Sheriff*, 2, 3, 4, 6.
- CONTINUANCE.
1. It is a good ground for continuance in the superior court, that the attorney, who is the party to the case and the sole counsel, is, at the time it is called for trial, engaged as counsel in the argument of an important case in the supreme court, the conflict in the hearing of the two cases being caused by an adjournment of the regular term of this court. *Hill vs. Clark et al., adm'r's*... 122
2. A showing for a continuance, on the ground of the absence of a witness by whom the party will "sustain

- his plea," is not, if objected to, sufficiently certain.
Butler vs. Ambrose, adm'x..... 152
3. This court will not grant a new trial on the ground of error in the judge in refusing a continuance if it appear, during the progress of the trial, that the witness for whose absence the continuance was sought was immaterial. *Ibid.*
4. Continuances are in the discretion of the court, and this court will not interfere with that discretion if the party complaining is wanting in proper diligence. *Atlantic and Gulf R. R. Co. vs. Florida Cons. Co.*..... 241
5. In this case, the court having granted the claimant's counsel leave of absence, though the docket did not show him to be of counsel, this court will not control its discretion in continuing the case. *Ross vs. Heard et al* 605

CONTRACTS.

1. When one owning a tract of land supposed to contain minerals entered into a contract with another, in which it was stipulated that the other might enter upon the land and test it at his own expense, and should the land contain the mineral (copper) as hoped for, the person testing should have the right to buy, at a fixed price, if the mine was equal in value to the Ducktown mines, the price to rise or fall accordingly as the mine was better or less valuable than said mines, and the testing was made and a valuable mine found, believed by the parties to be equal to the Ducktown mines, and the parties thereupon formed a joint stock company, the owner of the land taking one-fourth of the stock in full discharge of the amount agreed to be paid him: *Held*, that in considering whether the consideration agreed to by the owner of the land, to-wit: one-fourth of the stock, was a fair and adequate consideration, the cost of testing, together with the risk of losing the whole expenditure in case of failure, was the test of the consideration paid by the person testing, and if that was equal, under the circumstances, to three-fourths of the value, the consideration was fair and adequate. *North Ga. Min. Co. vs. Latimer*..... 47
2. On a bill filed for specific performance, if the contract be in writing, is fair and just in all its parts, is certain

and for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for it in other cases, and it was error in the judge to refuse to charge this as the law, in a case where the contract was in writing, and under the evidence it was competent for the jury to have found the contract, fair, just, certain, for an adequate consideration, and capable of being performed. *Ibid.*

3. By the provisions of section 2794 of our Code, contracts of insurance must be in writing, and a subsequent agreement to alter such a contract must also be in writing. *Simonton, Jones & Hatcher vs. Liverpool, London and Globe Ins. Co.* 76

4. Where the law requires a contract to be in writing, equity will grant relief, if the party complaining has so acted on the parol contract as that it would be a fraud upon him to permit the other to deny the contract. But in such cases the act must be in pursuance of the contract, *on the faith of it*, and *induced* by it. *Ibid.*

5. Where an action is brought on an account for services rendered, a recovery may be had on a special contract where the bill of particulars sets out fully the terms: *Johnson vs. Quin, adm'r* 289

6. An instrument in the following form, to-wit: "July 8, 1871. I hereby subscribe for one share of the capital stock of the North and South Railroad Company of Georgia, and hereby owe, and acknowledge myself indebted to said company in, the sum of \$100 00, payable to the order of said company on demand; provided the same is not to be paid, or any part thereof, until said road is graded from Columbus, Georgia, within one mile of the court-house in Hamilton, Georgia, within one year from date," is an agreement to pay to the company \$100 00 on demand, after the prescribed conditions are fulfilled, and not an agreement to pay what may be the market value of a share of the stock. *North and South R. R. Co. vs. Winfree*... 318

7. Where a contract between a railroad company and contractors provided that the chief engineer of the company should be the inspector of the work, and

determine when the contract had been complied with; that all disputes and differences should be adjusted by him, and his decision should be conclusive without further recourse or appeal; that should the work, in the opinion of the engineer, not progress in such manner as to insure its completion by the time stipulated, the said engineer, after giving ten days' notice, might proceed to have the work executed by hiring men, or by sub-contracting such portions thereof as he might deem necessary to insure its completion, at the expense of the contractors:

Held, that said engineer was made the arbitrator of the rights of the parties under the contract, and his decision was as conclusive and binding as the award of any other arbitrator, and could only be attacked for fraud or some other ground of illegality recognized for that purpose. *Grant, Alexander & Co. vs. Savannah, Griffin and North Alabama R. R. Co* 348

8. If the engineer failed to give the ten days' notice to the plaintiffs, as the work was progressing, prior to the time at which it was to be completed, and the company fail to avail itself of the privilege which it had, by the terms of the contract, to insure the completion of the work by that time, and allowed the plaintiffs to proceed with the work under the contract, making monthly estimates therefor, and if, when the work was completed, the engineer made a final estimate of the work, and if, in making such final estimate, he certified that it was finished according to the contract, with the exception of certain specified deductions made therein, then such acts and conduct on the part of the defendant would, in contemplation of the law, be a waiver of any claim for damages against the plaintiffs, under the contract, for not completing the work by the time stipulated therein, and the defendant would be estopped from claiming damages therefor. *Ibid.*

CORPORATIONS.

The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal. *Atlantic and Gulf R. R. Co. vs. Jacksonville, Pensacola and Mobile R. R. Co* 458

See Banks.

COUNTY COURT.

1. The judge of the county court of Dougherty county has the power, under the act of February 5th, 1873, to appoint the clerk of said court. Such power could have been exercised from the time of the passage of the act, although the original act organizing the court provided that the clerk of the superior court of the county shall be *ex officio* clerk of said court. *The State ex rel. vs. Gilbert*..... 224
2. Where a trial was had in the county court, and the writ of *certiorari* sued out thereto, the hearing upon which was had before the judge of the superior court at chambers, the bill of exceptions to his judgment need not be served upon the solicitor general of the circuit. Service upon the solicitor of the county court is sufficient. *Allen vs. The State*..... 264

COUNTY MATTERS.

1. The ordinary has no authority to purchase land for the benefit of the county, sold for non-payment of the state and county taxes. *Wilkins et al. vs. Benning et al* 9
2. Where an ordinary purchases for the county, land sold for the non-payment of the state and county taxes, at a sum far below its actual value, pays for it out of the county funds, holds it until reimbursed the sum thus paid out, and then conveys it to the county treasurer for an amount far less than its value, who purchases with a knowledge of all of the facts aforesaid, equity will decree a conveyance of said property to purchasers at a sale thereof under an execution against the former owner, based on a judgment obtained subsequent to the aforesaid tax sale. *Ibid.*
3. The ordinary has no authority to pay the city taxes on property purchased as aforesaid, out of the county funds. *Ibid.*
4. The person to whom the license to peddle is required to be granted, is he who travels and vends the goods and wares, and it is against such person that the process is to be issued, under section 536, Code, when he peddles without license. *Howard & Soule vs. Reid et al* 328

5. A process issued under said section against A and B, on the ground that, as partners, they did, on, etc., in the county, etc., "by *their agent*, peddle articles, etc., without having obtained license authorizing them to do so," etc., is, upon its face, illegal and void. *Ibid.*

CRIMINAL LAW.

1. Under an indictment against A for assault with intent to murder B, by shooting at him, willfully and feloniously; with a loaded pistol, the jury found the following verdict: "We, the jury, find the defendant guilty of shooting, not in his own defense, and recommend him to the mercy of the court."

Held, that the verdict is not void for uncertainty, and that judgment may, by reference to the indictment, be entered upon it for shooting at B, not in his own defense, and without justification. *Arnold vs. The State..* 144

2. When A was arrested on a charge of assault with intent to murder, and gave bond to appear at the superior court to answer, etc., and upon the finding of a true bill, the judge issued a bench warrant, under which A was arrested and continued in the custody of the sheriff until the trial, during the progress of which he escaped from the custody of the sheriff:

Held, that the securities of the bond taken by the magistrate were discharged by the subsequent arrest under the bench warrant, and are not liable on their bond. *Smith, governor, vs. Kitchens et al.....* 158

3. On a charge of assault with intent to murder, if the assault be not under such circumstances as if death had ensued, it would have been murder, it is illegal to convict the defendants of assault with intent to murder. *Seborn et al. vs. The State.....* 164

4. When three persons are tried together for assault with intent to murder and are found guilty, a new trial may, in this state, be granted as to one or more of the defendants, and the verdict stand as to the others. *Ibid.*

5. The advice given by the solicitor general to the security on the recognizance to have the principals in court as soon as he could get them there, with the assurance that the judgment of forfeiture would not be entered until next morning, may have misled the security so

- as not to have applied to the court for indulgence until next day, or to employ counsel for that purpose; and this, with the fact that the security did have the principals in court by the jury hour next morning, and so announced to the court, was sufficient to authorize the setting aside the judgment of forfeiture, although it had then been entered on the minutes. *Woodall et al. vs. Smith, governor.....* 171
6. Where, at the second term, after a demand for trial in a criminal case, the case was called in its order and the defendants failed to appear, and the recognizance was forfeited, and no new application was made to the court for trial, and no excuse given for failure to appear at the calling of the cause, it is too late after the juries are discharged, to ask for an order discharging the defendants, nor does it help the case that the judge had announced, after he had gone through the criminal docket, that he would not try any more criminal cases, and that the defendant's counsel had informed the solicitor general that they desired their case tried. The application should have been to the court, with an excuse for failing to appear at the calling of the cause. *Moreland et al. vs. The State.....* 192
7. On the trial of an indictment for an offense not capital, a verdict of guilty is not illegal because it contains a recommendation of the defendant to mercy. *Stephens vs. The State.....* 236
8. Nor is such a verdict a cause for a new trial unless it appear that the jury may have been misled by the charge of the court on that point. *Ibid.*
9. Where a defendant in a criminal case, gave a promissory note to the solicitor general for the fine imposed on him, and was afterwards pardoned by the governor and the fine remitted, and the same was unappropriated in the manner prescribed by law, such pardon and remission of the fine discharged the defendant from the payment of the note, even if it had been sued and judgment obtained upon it before the fine was remitted. *Parrott, ex'x, vs. Wilson.....* 255
10. The testimony of the sheriff, which was objected to, was admissible for the purpose of showing that the note on which the judgment was rendered was the one taken for the fine; and we cannot say that the judge,

- to whom the whole question was submitted, was not authorized to hold that the identity was proven. *Ibid.*
11. Under the constitution of 1868 the general assembly has authority to provide for the trial of misdemeanors in county courts and other inferior tribunals, by juries composed of a less number than twelve jurors. *Allen vs. The State*..... 264
12. Where the written accusation fails to charge the defendant with being a vagrant, because he was a professional gambler living in idleness, it was error to allow testimony showing such fact. *Ibid.*
13. If one enter a house with intent to commit a felony, but the entering is through an open door without any breaking, actual or constructive, the offense is not burglary, nor, under our Code, section 4386, is it a sufficient "breaking and entering into," that having entered with intent to commit a felony he unbolts a door to get out. *White vs. The State*..... 285
14. On the trial of an indictment for gaming it was in proof that the parties played for checks or "chips," which represented certain sums, which chips, when presented, were redeemed by the dealer at the price they represented :
Held, that this was playing for a thing of value, and the conviction was right. *Porter vs. The State*..... 300
15. Where, on the trial of A for murder, it was in proof that A and B came to where the deceased was at work, and that the killing took place after an altercation in which A and B joined :
Held, that it was not error in the court to permit the state to prove that B had, in A's presence, not long before the killing, inquired of the witness if the deceased was at work at the place he was killed, especially as the further proof was that A then said he would give the deceased a lick if he said what he heard he had said. *Wair vs. The State*..... 303
16. It is not error in the judge, on the trial of a case of murder, after fully charging the jury as to the law applicable to the facts as they appear in the proof, to fail to charge the jury that section of the Code which provides that all other cases standing on the same footing of reason and justice shall be justifiable homicide.
Ibid.

17. As the defendant is clearly guilty of murder, if the principal witness for the state is to be believed, and as the prisoner's own confession makes very nearly, if not quite the same offense, we cannot say the verdict is illegal. *Ibid.*
18. When the jury in a murder case, without any suggestion from the judge to mislead them in their verdict of guilty, recommend the prisoner to the mercy of the court, the verdict is not for this reason illegal, the verdict not being founded solely on circumstantial evidence, and the court will not hear the affidavits of jurymen that they misunderstood the effect of their verdict. *Ibid.*
19. Under our Code, section 4514: "If any two or more persons, either with or without common cause of quarrel, do an unlawful act of violence," it is a riot, and a violent assault or attempt to commit a violent injury upon the person of another, is an illegal act of violence within the meaning of the law. *Rachels vs. The State*..... 374
20. Joint offenders may be separately tried, and the acquittal of one of two charged with an offense, which it takes two to commit, does not operate as an acquittal of the defendant not tried. *Ibid.*
21. If a jury in a criminal case be impaneled, and before any evidence is submitted the solicitor general discovers that one of the jurors was of the grand jury that returned the bill, the court may, under section 4681 of the Code, withdraw such juror, unless both sides consent to waive the objection, and if the other juries have been discharged, may continue the case. *Jackson vs. The State*..... 402
22. To constitute the offense of an assault with intent to murder, it must appear that the circumstances connected with the assault were such, that had death ensued the accused would have been guilty of murder. *Ibid.*
23. A defendant was charged with committing this offense upon an officer whilst engaged in arresting one M. The accused introduced witnesses who testified that M. had surrendered and laid down his knife, and that the officer immediately called in others, who entered the room, some with pistols, and upon M.'s taking up his knife, but making no advance, the officer struck

him immediately several blows on the head with a heavy stick, which would, in the language of the witness, "have killed a man or a mule," and that the accused, under these circumstances, shot the officer. The court charged the jury that if the officer, in the execution of his authority, was obstructed or interfered with by the defendant, and in this interference the defendant did make the assault with intent to kill the officer, it would have been murder if the officer had died, unless they believe that the defendant had some provocation other than is set up in this case:

Held, that the legal effect of the charge was to wholly withdraw from the consideration of the jury the evidence submitted by the defendant, and it tended, in connection with another part of the charge, to impress the jury, that no matter what degree or character of violence may have been committed by the officer on M., the defendant was guilty of the offense charged. Though there was strong counter-evidence on the part of the state, the court should have left it to the jury to determine, if they were satisfied from the evidence that the accused had reasonable grounds to believe that the life of M. was in serious danger, and shot to prevent him from being unlawfully killed, whether those facts did not affect the question as to malice on the part of the defendant, so as to mitigate the offense of which he may be guilty. *Ibid.*

24. An indictment charging that the defendant did, on the fourth day of April, 1873, being Sunday, keep open a tippling house, when in fact the said fourth day of April was Friday, is not a good indictment, and a motion in arrest of judgment should have been sustained. *Werner vs. The State*. 426
25. Where, on the trial of an indictment for assault with intent to murder, there was evidence that whilst the prisoner and another were engaged in a fight, two other persons interfered against the prisoner, one striking at him with his knife, and the other hitting him with his fists, and the fight having ceased by mutual consent, the prisoner immediately cut his principal opponent with his knife, it was error in the court to refuse the following written request to charge the jury: "If the circumstances surrounding the prisoner at the time of the stabbing were such as to excite the fears

- of a reasonable man that he was in danger of losing his life, or that some great bodily harm would be done to him, he is not guilty," especially as it does not appear in the record that the court did charge that if there was great provocation (so as, that if death had ensued, the crime would have been manslaughter only,) then they could not find him guilty of assault with intent to murder. *Meeks vs. The State*..... 429
- ~~X~~
26. It was not error to admit testimony of the sayings of the prisoner next day after the fight, showing bitter hatred towards the person stabbed, as it tended to show malice at the time of the stabbing. *Ibid.*
27. It is not error in the court, on the trial of a criminal case, to require the witnesses of both the state and the prisoner to be sworn, and to leave the court-room before commencing the examination of any of the witnesses. *Ibid.*
28. It is not a good ground to quash an indictment that, in organizing the grand jury which found it, the judge discharged from the traverse jury a jurymen summoned and sworn thereon, and placed him upon the grand jury for the term, and that he was chosen foreman thereof. *Sims vs. The State*..... 495
29. It is not a good ground to quash an indictment that it was found at an adjourned term of the superior court. *Ibid.*
30. It is not error, on a trial for murder, for the court to allow evidence of a difficulty between the parties three weeks before. It bears upon the great question in every such case, to-wit: whether the killing was done with malice or not. *Brown vs. The State*..... 502
31. When a motion was made for a new trial, on the ground that a witness (whose affidavit was produced) would testify to certain threats made by deceased against the prisoner, and which the witness had communicated to the prisoner before the encounter in which the killing occurred, and the movant stated on oath that said facts and their importance did not occur to him at the trial, and that he had not informed his counsel of them, he being an ignorant man and knowing nothing of his rights:
Held, that as it appeared on the trial that the prisoner and deceased had each made threats the one to kill the

- other, and as the evidence now relied on was only cumulative, and could at least only strengthen a line of defense insisted on at the trial, it was not error in the judge to refuse the new trial, as the reason for the neglect to introduce it at the trial was unusual and open to suspicion. *Ibid.*
32. When a recognizance has been forfeited, the law requires that the clerk shall issue a *scire facias* thereon, returnable to the next term of the court; and if such officer allow the next term to pass, and then issue a *scire facias*, it was error in the court to render judgment thereon against the security at the succeeding term. *Wright vs. The State*..... 524
33. An indictment charging the defendant with the forgery of a bank check, payable to the order of, should be quashed on demurrer. *Williams vs. The State*..... 535
34. The check was not payable to bearer nor to the order of any named person, and was therefore so incomplete and imperfect that no one could have been defrauded by it. *Ibid.*
35. An indictment for forgery must specify the person intended to be defrauded. *Ibid.*
36. When a jury, on the trial of a criminal case, have retired to consider the verdict, and have been called back by the court to be recharged, it is the right of the defendant to have his counsel present, and he does not lose this privilege unless by a clear and distinct waiver thereof. *Martin vs. The State*..... 567
37. In criminal cases below the grade of felony, the testimony of an accomplice may be sufficient to authorize a conviction. *Crisson vs. The State*..... 597
38. But where the accomplice was impeached by showing that he had before the trial made affidavit that the defendant was not guilty, and stated in his testimony as a reason why he had sworn falsely, that it was done under a threat, which threat was denied by the person charged by him with having made it, he being also a witness:
Held, that it was error in the court in charging on the question of *alibi*—upon which point the defendant had introduced evidence, and which charge was found-

ed solely on the testimony of the accomplice, to say to the jury: "In disposing of the witness to prove the *alibi* you will consider whether there are any material facts proven in the case which challenge your full belief, which are entirely incompatible with the evidence of the witness, Robinson, who proves the *alibi*, then without imputing falsehood to him you will charitably conclude that he was mistaken as to the time, if the witness lived close by the accused, had frequent opportunities of seeing him, and frequently saw him drunk in visiting his house," etc. *Ibid.*

39. The power to punish offenders against its ordinances by fine or imprisonment, conferred upon a municipal corporation, does not include the authority to coerce the payment of a fine by imprisonment. *Brieswick et al. vs. Mayor and City Council of Brunswick*..... 689

DAMAGES.

1. In an action for a *tort*, the question of damages being one for the jury, the court should not interfere with the verdict, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias. *Patterson vs. Phinizy & Co.*..... 33
2. If the defendants abandoned the care of the cotton when it was thrown out of their buildings and were guilty of want of ordinary care in not retaking it, the measure of damages is the value of the cotton at the time of the abandonment and not at the time of the demand. *Smith & Oneal vs. Frost*..... 336
3. Damages for a continuing trespass, such as those arising from overflowing one's land, can only be recovered to the time of commencing suit therefor. Subsequent damages for a continuance of the trespass give a new right of action. *Savannah and Ogeechee Canal Co. vs. Bourquin*..... 378
4. The plaintiff in this case was not entitled to have included in the verdict, as part of his damages, the outlay he made for the purpose of planting and cultivating land which he knew was then overflowed. *Ibid.*
5. Where the witnesses state that the land taken by a railroad company is worth as land only \$6 00 or \$7 00 per acre, but in the form and for the purpose it is

taken it is worth to the balance of the land from \$30 00 to \$50 00 per acre, the presumption is that the increased valuation is put upon it on account of the damages done to the balance of the land; and no other damages should be allowed than what are specially stated and proved as further and additional damages.
Selma, Rome and Dalton R. R. Co. vs. Redwine, adm'x. 470

6. Where the witnesses give the value of the land appropriated by the road, on the basis above stated, the damages cannot be increased by general statements that the value of the land as taken, with the incidental advantages and disadvantages done to the land by the road, make a sum greater than what the value of the land thus estimated amounts to. *Ibid.*
7. The special damage suffered by the plaintiff's orchard may be allowed as proven. *Ibid.*
8. Interest in such cases cannot be given except as part of the damages, and then only from the time when the damages occurred. *Ibid.*
9. Under the authority given by statute to this court, it is directed that a new trial be granted, unless the defendant in error will write from the verdict and judgment the sum of \$220 00, and upon the same being done the judgment shall stand affirmed. *Ibid.*
10. When the questions made by the bill of exceptions have been before decided by this court adverse to the plaintiff in error, damages will be awarded. *Brown vs. Brown, ex'r*..... 554
11. In an action against a railroad company for an injury to the person, damages traceable to the act, but not its legal or natural consequence, are too remote and contingent. *Montgomery & W. P. R. R. Co. vs. Boring*..... 582
12. Pain and bodily suffering, resulting from a *tort* to the person, may be considered by the jury in estimating damages. *Western & Atlantic R. R. Co. vs. Drysdale*..... 644
13. Where the jury may, from the evidence, reasonably find that there were any aggravating circumstances, such as gross negligence in the act whereby the injury was inflicted, they may increase the damages beyond a mere compensation for the injury done; and in such a

case, where the judge who tries it refuses a new trial, the damages given must be grossly excessive before this court will interfere. *Ibid.*

DEBTOR AND CREDITOR.

1. Where the question at issue was, whether the conveyance of a tract of land by a father, who was in insolvent circumstances, to his son, for an alleged consideration, was made for the purpose of hindering and delaying his creditors, the possession by the father after the alleged sale was a badge of fraud. *Johnson vs. Lovelace*..... 18
2. If the deed was made for the purpose aforesaid, and it was taken by the son knowing such intent, then it was void as to the creditors of the father. *Ibid.*
3. The ability of the son to pay the purchase money for the land before and at the time of the purchase, was a material circumstance for the consideration of the jury. *Ibid.*
4. If the claimant has an equitable right to compel the plaintiff in execution to levy upon property still owned by the defendant, before levying upon land conveyed to him, he must allege it in his pleadings, to entitle him to such relief. *Gormerly vs. Chapman*..... 421
5. Where land is fraudulently conveyed by the defendant in execution to the claimant, for the purpose of defeating his creditors, such creditors may levy upon such property in the first instance, and this right is not defeated by the fact that the defendant subsequently employed counsel to subject said land to the payment of his debts. *Ibid.*

DECREE. See *Equity*, 7, 8.

DEEDS.

1. A deed was executed in 1861 by an administrator for land purchased at his sale, reciting that J. B., as trustee for his wife, M. B., was the highest bidder. It then acknowledges the receipt of the purchase money from J. B., trustee for M. B., and conveyed the land to J. B., trustee for M. B., his successors in office and assigns:

- Held*, that the deed having been made by an administrator to the husband and accepted by him, a separate estate in the wife was thereby created, although there were no special words in the deed to that effect. *Brown vs. Kimbrough, adm'r, et al* 35
2. Such being the legal effect of the deed, a bill filed by the wife against vendees holding under her husband, with notice of the deed, for the purpose of canceling the conveyances executed to them, and charging that the land was paid for by her husband out of her separate estate, is not demurrable. *Ibid.*
3. B. held judgments against F. for \$3,000 00, obtained before 1868. In 1869, F. had a homestead assigned in certain lots of land. It does not appear that there were any minor children. Before the homestead was finally approved by the ordinary, F. signed a deed, regularly attested, conveying one of the lots of land contained in the homestead to B. The wife of F. also signed the deed, but her signature was attested only by one witness. The deed recited the fact that B. held the judgments for \$3,000 00; that the homestead had been taken by F.; that B. had made no objections on an agreement that the lot should be conveyed to him in full satisfaction of the judgments, provided they were not paid:
- Held*, that as no title was vested in the beneficiaries of the homestead as against the judgments held by B., and as no fraud is charged in the transaction, the title conveyed by F. to B. is good against the claimant under the homestead. *Burnside vs. Terry et al* 186
4. An instrument which has all the formalities of a deed, except the following words in the concluding part of it: "This deed is not to go into effect until after the death of said B. Bright, (the grantor,) he being very ill," under the 2395th section of the Code, is a testamentary paper. *Bright et al. vs. Adams et al* 239

DISCOVERY. See *Equity*, 6, 15.

DISTRIBUTION.

1. The grand-child of an intestate, whose father died before the grand-father, takes an interest in the estate of the intestate, subject to the advancements made to the

- father of such grand-child. *Bransford, adm'r, vs. Crawford* 20
2. The declaration of such intestate, that certain notes which he held on his son, were not held by him as debts against his son, but as advancements to him, are admissible in evidence in an action by the grand-child for her share in the grand-father's estate. *Ibid.*
3. By an act of the legislature of this state, passed in 1850, the name of Mathew R. Brown, of the county of Muscogee, was "changed to that of Mathew Downer, and it was enacted that he be entitled to all the rights and privileges that he would have been entitled to had he been born the son of Joseph Downer, of the county of Muscogee, and be made capable by this act of taking, receiving and inheriting all manner of property under the statute of distribution of this state, so far as relates to the estate of the said Joseph Downer." The son thus adopted died before the said Joseph, leaving children :
Held, that in the distribution of the property of Joseph Downer, the children of Mathew stood in the place of and represented the father, and took whatever of said estate he would have taken if living. *Pace, adm'r, et al., vs. Klink, adm'r, et al.* 220
4. When legatees take the individual note of the executor, secured by mortgage on his individual property, in discharge of their legacies and receipt him therefor, as executor, the debts lose their fiduciary character. *Lawton & Willingham et al. vs. Fish, ex'x* 647

EASEMENT. See *Water*, 2, 5.

EJECTMENT.

1. Where there was an action of ejectment with two demises, one from "The Central Female College," an incorporation, and the other from five persons as trustees of a church, and on the trial a deed was shown to the premises from the Central Female College to the said trustees, but it appeared that all of the trustees were dead at the commencement of the suit but three, and that the suit was brought without any authority from either of the three living :
Held, that the court was right in dismissing the suit. *Central Female College vs. Persons* 486

2. Under the facts of the case, as they appear from the whole record, it was not error in the judge to refuse to reinstate the case on the showing made. The title having passed out of the "Central Female College," the right to sue or to use the name of the college is in the trustees of the church, and as to authority from the trustees of the church, the whole subject was fairly before the court at the trial, and on the previous motion for continuance. *Ibid.*

EQUITY.

1. Where an ordinary purchases for the county, land sold for the non-payment of the state and county taxes, at a sum far below its actual value, pays for it out of the county funds, holds it until reimbursed the sum thus paid out, and then conveys it to the county treasurer for an amount far less than its value, who purchases with a knowledge of all of the facts aforesaid, equity will decree a conveyance of said property to purchasers at a sale thereof, under an execution against the former owner, based on a judgment obtained subsequent to the aforesaid tax sale. *Wilkins et al. vs. Benning et al.* 9

2. On a bill filed for specific performance, if the contract be in writing, is fair and just in all its parts, is certain and for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for it in other cases, and it was error in the judge to refuse to charge this as the law, in a case where the contract was in writing, and under the evidence it was competent for the jury to have found the contract, fair, just, certain, for an adequate consideration, and capable of being performed. *North Ga. Min. Co. vs. Latimer* 47

3. Where the law requires a contract to be in writing, equity will grant relief, if the party complaining has so acted on the parol contract as that it would be a fraud upon him to permit the other to deny the contract. But in such cases, the act must be in *pursuance* of the contract, *on the faith of it*, and *induced* by it. *Simonton, Jones & Hatcher vs. Liverpool, London and Globe Ins. Co.* 76

4. When one had a policy of insurance on a stock of goods in a certain house, and undertook to remove the

goods to another house, and whilst actually engaged in such removal was asked (as is alleged) by the agent of the company, if he desired his policy transferred. The insured replied, by all means, if necessary, and the agent consented to the removal, and promised to make the necessary entry on the books. The insured, thereupon, continued the removal, took out no new insurance, and his goods were subsequently lost by fire: *Held*, that this was not such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing. *Ibid.*

5. On January 24th, 1867, S. executed his mortgage deed upon a lot in the city of Atlanta to G., to secure the payment of a promissory note for \$2,822 50. The mortgage was foreclosed, and the execution issuing therefrom levied upon the property mortgaged. After the foreclosure, S. had said lot set apart to him as a homestead under the act of 1868, and, with the approval of the ordinary, as required by said act, sold the same to M. for \$1,750 00, the value of the lot. M., under the decisions of a majority of this court, believing his title good, placed improvements on said lot to the value of \$2,500 00. He claimed the property, and filed an equitable plea, praying that he might be allowed the value of his improvements, the supreme court of the United States having declared the act of 1868 unconstitutional as against contracts existing before its date:

Held, that the entire property with improvements should be sold, and the value of the lot at the time of the sale to the claimant, with interest thereon, paid to the mortgagee *f. fa.*, and the balance to the claimant. *Mo-Phee vs. Guthrie & Co.*.....

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6. Where complainants make the defendant their own witness by praying discovery, he is bound to relate the whole truth and to explain the entire transaction with which he is charged. All statements in his answer, to this end, are responsive to the bill. *Moody, adm'r, vs. Metcalf et al.*.....

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7. In the case of a creditor's bill to marshal the assets of an insolvent railroad company, there had been a receiver appointed; the claims of all the parties had been referred to a master who had made a report, fixing the amount, character and liens of the several claimants

upon the fund, and this report had been excepted to, and each claim had been considered and passed upon by the jury, or by consent by the judge without a jury, and a judgment taken fixing the amount, character and lien upon the fund of each, and thereupon there had been a decree taken, by consent of all parties, for the sale of the road, and that the proceeds should be brought into court and be distributed according to the liens fixed by the decree, reserving the rights of certain parties, where claims were yet unsettled, and the road was sold, and at the next term of the court a final decree was passed, holding up so much of the proceeds as was necessary to pay the claimants then before the court the amount and lien of whose claims were yet unsettled, and ordering the remainder of the fund to be paid out by commissioners, according to the consent decree, and barring all others:

Held, that such a final decree was right and proper under the facts of the case; that it needed no intervention of a jury, and was only the final judgment of the court to carry into effect, through ministerial officers, the previous decree, taken by consent of all parties.

Clews & Co. et al. vs. First Mortgage Bondholders et al. 131

8. A decree by a court of record, purporting upon its face to be taken by consent of all parties to the record, has the verity of a record as to the recital of the consent, and is not to be controverted except for fraud, accident or mistake, and then only on a proceeding directly to set it aside. *Ibid.*
9. Under the act of 1866 and the constitution of 1868, which secure to a married woman, as her separate estate, all property given to, inherited or acquired by her, the husband cannot assert her rights in reference to such property in his own name. *Dunnahoo vs. Holland, ex'r, et al.*..... 147
10. As the agreement provides that when the estate is ready for distribution, it shall be paid out "to each of the children of the deceased," the husband of one of the daughters cannot, by a bill filed in his own name, enjoin a suit pending against him for the purchase money of property of the estate sold by the executors, for the purpose of setting off against said claim his wife's interest in said estate. For the same reason the other children must be made parties. *Ibid.*

11. As the will conveyed certain lands to the children of complainant, and as the subsequent agreement did not affect them, they were not necessary parties. *Ibid.*
12. A bill was filed by various creditors of A, claiming to have liens on his effects, and a receiver was appointed who took the assets into possession and reduced them to money. There was a trial and a verdict distributing the money among the liens, but before any formal decree was made and the money paid out, B filed a petition setting up that he was a judgment creditor, having a higher lien than any of the original claimants, and praying that his debt be paid:
Held, that whilst it was not too late for B to come in, as the fund was still under the control of the court, yet the decree of the jury was *prima facie* to be taken for true, and if was not error in the court, B offering no proof to contradict the charges in the bill, to decide the questions of priority according to the face of the record. *Gray vs. Perry et al.* 181
13. Where a bill was filed for the specific performance of a contract, not in writing, alleging that the officers of a certain railroad company, in consideration that the plaintiff would consent that the road should run through his land, without charge against the company for the right of way or for damages, if the company would erect a depot on plaintiff's land and make it one of its stations, and setting forth that the road had been built, and that plaintiff had not claimed or recovered anything for the right of way or for his damages:
Held, that there was no such part performance of the contract by either party as authorized a specific performance of this agreement, not in writing, in relation to lands or an interest therein. *Haisten vs. Savannah, Griffin and North Alabama R. R. Co.* 199
14. A B died since the act of 1866, leaving as his heirs-at-law five daughters, all of whom were married, and also leaving a widow. Three of the daughters and their husbands, as complainants, filed a bill against another daughter and her husband, seeking to set aside as fraudulent a deed made by the deceased to the defendants during his life, giving to them certain lots of land. The bill did not make the widow or the other daughters parties. The jury found for the complainants, and decreed that the land should be sold, the pro-

ceeds be applied to the support of the widow for life, and at her death be distributed among the heirs-at-law of the deceased father:

- Held*, that the verdict was illegal. The husbands of the daughters, the complainants, had no interest in the land, and if the deed was set aside, the rights of the widow and the heirs was fixed by law, and not in issue before the jury. *Smith et al. vs. Pate et al.*..... 246
15. The answers of the defendants, so far as they go to explain the arrangement made for the disposition of the land and negroes in November, 1863, are, under the charges in the bill, responsive, and were properly submitted to the jury as evidence. *Ferguson vs. Ferguson, ex'r, et al.*..... 340
16. It is not necessary that a defendant should make an affidavit of any sort for the purpose of amending his answer, unless in the case of a sworn answer to make oath to the amendment. *Ibid.*
17. When a complainant does not rely on the answer of the defendant, and introduces other evidence on the trial, the defendant, if he offers no evidence, is entitled to the conclusion in the argument to the jury. *Ibid.*
18. The defendant can obtain the same relief in a court of law, as to the rescission of the contract, as he could in a court of equity, and have the verdict so moulded as to compel the defendant to surrender the possession of the land, and to place the parties in the same condition in which they were before the contract was made. *Sizemore vs. Pinkston*..... 398

ESTATES. See *Wills*, 8.

ESTOPPEL.

1. When one had a policy of insurance on a stock of goods in a certain house, and undertook to remove the goods to another house, and whilst actually engaged in such removal, was asked (as is alleged) by the agent of the company, if he desired his policy transferred. The insured replied, by all means, if necessary, and the agent consented to the removal; and promised to make the necessary entry on the books. The insured, thereupon, continued the removal, took out no new insurance, and his goods were subsequently lost by fire:

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- Held*, that this was not such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing. *Simon-ton, Jones & Hatcher vs. Liverpool, London and Globe Ins. Co.* 76
2. The plaintiff having taken a mortgage from the maker of said note on one-fourth of the crop, to secure its payment, is estopped from claiming the said one-fourth from the defendant. *Rhodes vs. Hart* 320
3. If the engineer failed to give the ten days' notice to the plaintiffs, as the work was progressing, prior to the time at which it was to be completed, and the company failed to avail itself of the privilege which it had, by the terms of the contract, to insure the completion of the work by that time, and allowed the plaintiffs to proceed with the work under the contract, making monthly estimates therefor, and if, when the work was completed, the engineer made a final estimate of the work, and if, in making such final estimate, he certified that it was finished according to the contract, with the exception of certain specified deductions made therein, then such acts and conduct on the part of the defendant would, in contemplation of the law, be a waiver of any claim for damages against the plaintiffs, under the contract, for not completing the work by the time stipulated therein, and the defendant would be estopped from claiming damages therefor. *Grant, Alexander & Co. vs. Savannah, Griffin and North Alabama R. R. Co.* 348

EVIDENCE.

1. The grand-child of an intestate, whose father died before the grand-father, takes an interest in the estate of the intestate, subject to the advancements made to the father of such grand-child. *Bransford, adm'r, vs. Crawford* 20
2. The declaration of such intestate, that certain notes which he held on his son, were not held by him as debts against his son, but as advancements to him, are admissible in evidence in an action by the grand-child for her share in the grand-father's estate. *Ibid.*
3. A witness may give his opinion of the sanity of a testator, if he state the facts on which that opinion is founded. *Dennis et al. vs. Weekes* 24

4. Under this rule, the opinion of the witness, Peek, as to the condition of testator's mind when he last saw him, was admissible, for he gives the facts on which he rests that opinion. The same may be said of the opinion expressed by caveatrix in her testimony. *Ibid.*
5. But ~~this~~ does not entitle the witness to give an opinion "that testator was in a condition to be easily influenced," or "that he seemed to be under the influence of W. altogether," or to state, "he cannot say what the full influence of W. was, although he (the testator) seemed to be obedient to the commands of W." The witness should give the facts on which these statements were based. *Ibid.*
6. The remark made by caveatrix in her testimony: "I did not know that W. was the first, and probably by far the largest legatee in the will," was not admissible to prove that W. was such a legatee, but it was competent for her to give it as a reason, and for what it was worth, as such, why she had changed her purpose, as indicated by former declarations of hers, not to contest the will. *Ibid.*
7. On the trial of an issue of *devisavit vel non*, the admission of an executor before qualification is admissible to impeach the will, when such admission is in reference to the conduct or acts of the executor as to some matter relevant to the issue. *Ibid.*
8. Parol evidence of the declarations of a testator, expressing dissatisfaction with his will, and made shortly after its execution, such as "I have done something I ought not to have done; I have made my will, and did not make it as I wanted to; I know I did wrong, but I could not help it. Lord God Almighty, who ever heard of such a will, but I can't change it," is admissible, not to prove the fact that fraud was practiced upon him, or that undue influences was actually exercised, but as tending to show the state of testator's mind, and that he was in a condition to be easily influenced. *Ibid.*
9. In a suit upon an unliquidated account, the plaintiff stated in his answers to interrogatories taken out in his own favor, to which was attached a copy of the account sued on, as follows: "We did keep a regular

- set of books in the years 1867 and 1868, and the account is correct." 120
- Held*, that this was not sufficient proof of the account; the answer, plainly, is based upon the books, and they should have been produced, proven and supported, in the usual way. *Crawford, adm'r, vs. Stetson & Bro...* 120
10. Under the construction of the contract and of the order of the court permitting the plaintiff in error to take from the receiver the cars in dispute, on his giving up his right to go upon the general fund for the amount of his debt, reserving his right to claim hire and damages, we are of opinion that the court erred in ruling out the testimony as to the value of the rent of the cars and the damage to the cars over and above the wear and tear, and on this ground we think there ought to be a new trial. As to the six cars not delivered, we do not see that any issue was made as to them. *Dawson Manufacturing Co. vs. Brunswick & Albany R. R. Co. et al.....* 136
11. Where clients authorize their attorney at law to make a certain contract with a party, which is done, and the contract is carried out according to the agreement, such authority thus given is not a confidential communication by the clients, and the attorney is a competent witness to prove the contract. *Burnside vs. Terry et al* 186
12. On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of his co-employees, it was error in the court to permit the plaintiff to testify before the jury, that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life. *East Tennessee, Virginia and Georgia R. R. Co. vs. Duggan* 212
13. Where no plea of *lis pendens* is filed, a record showing the pendency of a former suit between the same parties, involving the same issue, is inadmissible. *Brown vs. Patterson, ex'r.....* 229
14. Where the written accusation fails to charge the defendant with being a vagrant, because he was a professional gambler living in idleness, it was error to allow testimony showing such fact. *Allen vs. The State.* 264

15. Whether answers to interrogatories which are claimed to be leading, shall be read, is a question resting in the sound discretion of the judge trying the cause, and this court will not overrule his judgment unless it be manifest that injustice has been done. *Ewing, adm'r, et al. vs. Moses, adm'r*..... 410
16. Where the main issue in a cause on trial was whether the defendant had procured a receipt in full from an heir-at-law by false representations, and it was in proof that he had written a certain letter to B, another of the heirs, and had in that letter directed B to communicate with the plaintiff, and that he had written letters to other heirs, referring to this letter to B, and the plaintiff, in her interrogatories, stated that in giving the receipt she acted on said letters, with a like one to herself, and attached to her answers the original letter to B:
Held, that it was not error in the judge to permit the answers and the original letter to B to go to the jury in evidence. *Ibid.*
17. If the defendant put in evidence the testimony of the principal as to what he said to the payee at the time the words were added to the note which are complained of, for the purpose of showing that he, the principal, was to be exclusively bound for the additional liabilities caused by those words, it is competent for the plaintiff, in rebuttal thereof, to prove all that the principal said at the time, as part of the *res gestæ*. And if such proof be not competent to charge the security with knowledge of and consent to the change, he should ask the court, by its charge to the jury, or when the evidence is admitted, so to limit its effect.
Hanson vs. Crawley 528
18. When, on the trial of a claim to property levied on under an execution, the issue was whether the sale of the land levied on by the defendant to the claimant, was fraudulent, and the plaintiff in execution offered to prove that about the time of the sale in question, the defendant had sold to the claimant, who was his son-in-law, all his other real estate:
Held, that this was competent evidence to go to the jury on the question of fraud, and it was error in the court to reject it. *Engraham vs. Pate*..... 537

19. Where witnesses, in explaining how they went into possession of certain property, state that it was under a lease, the answer is inadmissible. The lease should be produced or its loss accounted for. *Matthews vs. Woolfolk et al., ex'rs*..... 618
20. A letter written by the attorney of the plaintiff to the defendant is not competent evidence for the defendant, on the trial of the case, unless it is shown that it was written by authority of the client. *Cassels, trust., vs. Usury, Sturgis & Co*..... 621
21. It was competent for the witness to explain what was the understanding of the parties, at the time the receipt was given, of the following words contained therein: "This receipt being binding on said company until policy is received." *Scurry et al. vs. Cotton States Life Insurance Co.*..... 624

EXECUTION.

1. A ministerial officer is protected in the execution of a process from a court of competent jurisdiction, where there is nothing on the face of the process or attached thereto, showing that it is illegal or void, or that it has been superseded. *Johnson vs. Fox et al.*..... 270
2. In an action against an officer for levying and selling under such a process, if the plaintiff rely on the fact that it has been superseded, he should not only so state in the declaration, but should also charge notice of that fact on the officer. *Ibid.*
3. If an execution issue in accordance with the judgment in a case, it is not a good ground for an affidavit of illegality to stay the execution that the judgment is irregular. *Emory, ex'x, vs. Smith, for use, etc.*..... 323
4. The claimant's right to be protected as a *bona fide* purchaser against the lien of the plaintiff's judgment, on account of his four years' possession of the property, cannot be defeated by a levy without the notice which the law requires to be given. *Anderson & Co. vs. Chenney*..... 372
5. If the claimant has an equitable right to compel the plaintiff in execution to levy upon property still owned by the defendant, before levying upon land conveyed to him, he must allege it in his pleadings, to entitle him to such relief. *Gormerly vs. Chapman*..... 421

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6. Where land is fraudulently conveyed by the defendant in execution to the claimant, for the purpose of defeating his creditors, such creditors may levy upon such property in the first instance, and this right is not defeated by the fact that the defendant subsequently employed counsel to subject said land to the payment of his debts. *Ibid.*
7. Where an execution against the mother is levied upon property generally, in which the children have an interest, and neither the interest of the mother nor of the children is clear and ascertained, the sale will be enjoined. *Sims et al. vs. Phillips et al.* 433
8. A levy upon property in which others besides the defendant are interested, must specify the interest levied on. *Ibid.*
9. Land having been given in for taxation for the year 1868 by the agent of the estate of a non-resident, he having died in the year 1860, which was subsequently sold by the sheriff for the non-payment of state and county taxes, under an execution for the same against such agent, the purchaser at such sale acquired a valid title. *Williams, adm'r, vs. Young, adm'r* 453
10. A decree rendered against the defendant in a bill, with the word "executor" added to his name, without more, binds his personal goods and chattels. *Tinsley et al. vs. Lee* 482
11. The addition of the word "executor" to the defendant's name in the execution is a mere irregularity, which would not affect the purchaser's title. *Ibid.*

EXECUTORS. See *Administrators and Executors.*

FACTORS. See *Appropriation of Payments*, 1, 2, 3.

FINES. See *Criminal Law*, 38.

FRAUDULENT CONVEYANCE.

1. Where the question at issue was whether the conveyance of a tract of land by a father who was in insolvent circumstances, to his son, for an alleged consideration, was made for the purpose of hindering and delaying his creditors, the possession by the father after

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- the alleged sale was a badge of fraud. *Johnson vs. Lovelace*..... 18
2. If the deed was made for the purpose aforesaid, and it was taken by the son, knowing such intent, then it was void as to the creditors of the father. *Ibid.*
3. The ability of the son to pay the purchase money for the land, before and at the time of the purchase, was a material circumstance for the consideration of the jury. *Ibid.*
4. When, on the trial of a claim to property levied on under an execution, the issue was whether the sale of the land levied on, by the defendant to the claimant, was fraudulent, and the plaintiff in execution offered to prove that about the time of the sale in question, the defendant had sold to the claimant, who was his son-in-law, all his other real estate :
Held, that this was competent evidence to go to the jury on the question of fraud, and it was error in the court to reject it. *Engraham vs. Pate*..... 537

GARNISHMENT.

1. Where money is brought into court under an execution issued upon a judgment against a garnishee, the oldest judgment against the defendant takes the fund. *Garrard, ex'r, vs. Moffett*..... 93
2. As a general rule, a creditor of one of the several partners cannot reach the interest of his debtor by a summons of garnishment upon one who is indebted to the firm ; but when A, having a judgment against a partner, served a summons of garnishment against a bank having money of the firm on deposit, and the firm filed a bond as claimants of the fund, as provided by the act of 1871, and thus made the partnership a party to the garnishment, the creditor may, under our law authorizing a court of law to give equitable relief, so shape a traverse of the garnishee's answer as to make an issue upon the interest of his debtor in the partnership, at the date of the judgment, or since, and appropriate to the payment of his judgment as much of the deposit in the hands of the garnishee as equals that interest. *Branch, Scott & Company vs. Adam, Smith & Company*... 113

3. In this case the objection to the summons of garnishment, on the ground that it is double, may be cured by amendment; the requirement in the summons that the garnishee shall answer what he owes the principal debtor, is the substance of the proceeding, and the addition requiring him to answer what he owes the firm is surplusage, and may be stricken out, if objected to. *Ibid.*
4. Under the act of 1869, a garnishee must answer not only what he was indebted, etc., at the date of the summons of garnishuient, but also "what he has become indebted to the defendant, or what property or effects of his he has received or got possession of, belonging to the defendant, between the time of the service and the answer;" and under this rule, if a bank, under summons of garnishment, receives deposits of the defendant, and pays them to his checks, it is liable to the garnishing creditor for the amount deposited up to the time of the filing of the answer. *Mayer & Lowenstein vs. Chattahoochee National Bank.....* 325
5. When A deposits money in a bank, with directions that it is to be paid out to a check which he has given, or will give, to C, the money is still the money of A until the bank either pays it, or promises C to pay it, or unless it be deposited at the instance or procurement of C, or under an arrangement with him. *Ibid.*
6. The undivided interest of a partner in the firm property is not liable to levy and sale, even after dissolution, but must be reached by process of garnishment. *Anderson & Co. vs. Chenney.....* 372
7. Where a judgment creditor of an estate served a summons of garnishment against A, as the debtor of said estate, and A, in his answer, admitted that he had bought property at the estate sale, and gave his note to the administrator, but set up that the note had, before the service of the summons, been handed over by the administrator to a third person in payment of a judgment of the highest dignity against the estate, and that said note was still the property of said third person :
Held, that on the trial of an issue traversing this answer, it was not competent for the judgment creditor to introduce evidence to show that in the original suit

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- between him and the administrator, it was one of the issues whether this particular note was not then in hand as assets for the payment of the plaintiff's debt, and that said issue had been found in his (the plaintiff's) favor, it not appearing that either the garnishee or the person claiming the note, was a party to said issue. *Badkins vs. Mehaffey* 450
8. Where a plaintiff, who sues out a summons of garnishment, signs the partnership name of which he is a member, as surety to the bond required by law, and his partner is present consenting thereto, and afterwards comes into court and ratifies the same under seal, and proposes to substitute his signature for that of the firm :
Held, that the amendment to the bond should have been allowed, and whilst we are strongly inclined to the opinion that the bond was binding on the partner individually who thus consented to the signing, we are satisfied it was error to refuse the amendment and to dismiss the garnishment. *Cunningham, assignee, vs. Lamar* 574
9. The monthly wages of a forwarding clerk in the employment of a railroad company, whose duty it is to attend daily to the forwarding of goods, to report in the morning when the drays commence work, and in the evening when the day's labors are over, the company reserving the right to discharge him at any time, are not subject to the process of garnishment. *Claghorn & Cunningham vs. Saussy* 576
10. Service of summons of garnishment on the defendant in execution is not a ground of which the sheriff can avail himself in an answer to a rule against him to show cause why he should not pay the money due on the *f. i. fa.* *Cowart, sheriff, vs. Chaffee, Croft & Chaffee*.. 606

GUARANTY.

- A letter of credit guaranteeing the payment of what the party in whose favor it is drawn may purchase from any dealer in a certain city, cannot be altered without the drawer's consent, so that it will bind them for what may be purchased of dealers in another and different city. *Johnson vs. Brown et al.* 498

HOMESTEAD.

1. On January 24th, 1867, S. executed his mortgage deed upon a lot in the city of Atlanta to G., to secure the payment of a promissory note for \$2,822 50. The mortgage was foreclosed, and the execution issuing therefrom levied upon the property mortgaged. After the foreclosure, S. had said lot set apart to him as a homestead under the act of 1868, and, with the approval of the ordinary, as required by said act, sold the same to M. for \$1,750 00, the value of the lot. M., under the decisions of a majority of this Court, believing his title good, placed improvements on said lot to the value of \$2,500 00. He claimed the property, and filed an equitable plea, praying that he might be allowed the value of his improvements, the Supreme Court of the United States having declared the act of 1868 unconstitutional as against contracts existing before its date:

Held, that the entire property with improvements should be sold, and the value of the lot at the time of the sale to the claimant, with interest thereon, paid to the mortgagee *f. fa.*, and the balance to the claimant.

McPhee vs. Guthrie & Co.....

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2. B held judgments against F. for \$3,000 00, obtained before 1868. In 1869, F. had a homestead assigned in certain lots of land. It does not appear that there were any minor children. Before the homestead was finally approved by the ordinary, F. signed a deed, regularly attested, conveying one of the lots of land contained in the homestead to B. The wife of F. also signed the deed, but her signature was attested only by one witness. The deed recited the fact that B. held the judgments for \$3,000 00; that the homestead had been taken by F.; that B. had made no objections on an agreement that the lot should be conveyed to him in full satisfaction of the judgments, provided they were not paid:

Held, that as no title was vested in the beneficiaries of the homestead as against the judgments held by B., and as no fraud is charged in the transaction, the title conveyed by F. to B. is good against the claimant under the homestead. *Burnside vs. Terry et al*.....

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3. A purchaser of a homestead set apart under the act of 1868, takes it subject to any judgments against the



- head of the family, existing at the time of the purchase, if they be founded on contracts entered into by him previously to the adoption of the constitution of 1868. *Grant vs. Cosby*..... 460
4. Whether such purchaser is subrogated to the right of the debtor to set up the homestead allowed by the Code or by the act of 1823? *Quare. Ibid.*
5. When a town lot was set apart as a homestead, under the act of 1868, and it was levied upon and sold under a judgment founded on a debt contracted prior to 1868, and the debtor gave notice to the sheriff that he claimed \$500 00 of the proceeds to be invested in a homestead for himself and family, under the provisions of the Code, and it appeared, on a rule to distribute the money, that there were unsatisfied judgments in the hands of the sheriff to the amount of \$2,500 00, and only \$750 00 money in court:
Held, that it was not necessary that the notice to the sheriff should be given before the sale, and that there was sufficient evidence, *prima facie*, of the insolvency of the debtor to require that the \$500 00 claimed should, under the direction of the court, be invested in a homestead for the debtor and his family, as provided by section 2044 of the Code. *Ragland et ux. vs. Moore, Trimble & Co*..... 476
6. Possession under an order setting apart a homestead to the wife of the defendant in execution, cannot be tacked to subsequent possessions to protect the purchaser under section 3583 of the Code, from the seizure of said homestead under an execution based on a debt contracted prior to the adoption of the constitution of 1868. *Smith, agent, vs. Ezell*... 570

HUSBAND AND WIFE.

1. Although a husband purchases property with money belonging to his wife, the presumption is that the property belongs to the husband, until the contrary is shown. *Moye vs. Waters* 13
2. Where the husband transfers to his creditor a promissory note before its maturity, which belongs to and is payable to his wife, or bearer, and the wife sues the creditor in trover for the note—it was not error for the court to refuse to charge the jury, a written request of

plaintiff—that the transfer did not divest the title to the note. The request should have contained the qualification that the jury should believe from the evidence that defendant had notice that the note was the property of the wife. *Ibid.*

3. A deed was executed in 1861 by an administrator, for land purchased at his sale, reciting that J. B., as trustee for his wife, M. B., was the highest bidder. It then acknowledges the receipt of the purchase money from J. B., trustee for M. B., and conveyed the land to J. B., trustee for M. B., his successors in office and assigns :

Held, that the deed having been made by an administrator to the husband and accepted by him, a separate estate in the wife was thereby created, although there were no special words in the deed to that effect. Such being the legal effect of the deed, a bill filed by the wife against vendees holding under her husband, with notice of the deed, for the purpose of canceling the conveyances executed to them, and charging that the land was paid for by her husband out of her separate estate, is not demurrable. *Brown, by next friend, vs. Kimbrough, adm'r, et al.....*

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4. Where a marriage settlement was executed, by which a vested remainder interest in the wife was conveyed to trustees for the purpose of protecting it from the marital rights of the husband, and to secure the same for the benefit of herself and children, should she have any, reserving the right to dispose of the same by will or otherwise, during coverture, if she had no children, and in the event of her failure to make any disposition thereof during life, then to go to her heirs-at-law :

Held, that upon the death of the husband, without any children by that marriage, leaving the wife surviving, the trust was executed, and that the widow held the property in the same manner as she did before her marriage. *Rogers, trust., et al., vs. Cunningham, ex'r.....*

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5. Upon the second marriage of the widow, said remainder interest, in the absence of a settlement, vested in her husband by virtue of his marital rights. *Ibid.*
6. Under the act of 1866 and the constitution of 1868, which secure to a married woman as her separate estate, all property given to, inherited or acquired by her, the husband cannot assert her rights in reference to

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- such property in his own name. *Dunnahoo vs. Holland, ex'r, et al.*..... 147
7. As the agreement provides that when the estate is ready for distribution, it shall be paid out "to each of the children of the deceased," the husband of one of the daughters cannot, by a bill filed in his own name, enjoin a suit pending against him for the purchase money of property of the estate sold by the executors, for the purpose of setting off against said claim his wife's interest in said estate. For the same reason the other children must be made parties. *Ibid.*
8. A B died since the act of 1866, leaving as his heirs-at-law five daughters, all of whom were married, and also leaving a widow. Three of the daughters *and their husbands*, as complainants, filed a bill against another daughter and her husband, seeking to set aside as fraudulent a deed made by the deceased to the defendants during his life, giving to them certain lots of land. The bill did not make the widow or the other daughters parties. The jury found for the complainants, and decreed that the land should be sold, the proceeds be applied to the support of the widow for life, and at her death be distributed among the heirs-at-law of the deceased father:
Held, that the verdict was illegal. The husbands of the daughters, the complainants, had no interest in the land, and if the deed was set aside, the rights of the widow and the heirs was fixed by law, and not in issue before the jury. *Smith et al. vs. Pate et al.*..... 246
9. To justify the granting of the injunction in this case, it should have been made distinctly to appear that the money of the wife was put in the firm business without the knowledge or consent of the wife, and as this is not even distinctly stated in the bill, the injunction ought, for this reason, to have been refused. *Bryan & Hunter vs. King*..... 291
10. Where an unmarried woman was administratrix of an estate, and being sued as such, filed a plea of *plene administravit*, and pending the suit she married and her letters abated, and her husband took out letters *de bonis non* on the estate, and was made a party, and he also filed a plea of *plene administravit*, and a general judgment was had for the plaintiff:

Held, that no right of the wife was affected by the verdict. *Badkins vs. Mehaffey*..... 450

ILLEGALITY.

1. The question made by the affidavit of illegality being one of doubt and difficulty for even judicial officers to decide, it was not error in the court to decline to render a rule absolute against the sheriff for refusing to disregard it. *Heard vs. Callaway*..... 314
2. If an execution issue in accordance with the judgment in a case, it is not a good ground for an affidavit of illegality to stay the execution that the judgment is irregular. *Emory, ex'x, vs. Smith, for use*..... 323
3. Where a judgment was obtained against a principal and security on a promissory note, and an appeal was entered by the defendants, the security filing a plea of *non est factum*, and pending the appeal it was agreed by the plaintiff that if the security would withdraw his appeal and permit the judgment below to stand, he, the plaintiff, would look to the principal alone for the payment of the judgment:

Held, that on the withdrawal of the appeal, the security was relieved, and that he might set up this relief by an affidavit that the execution issued on the original judgment was proceeding illegally, and setting forth the facts of the agreement and his action thereon. *Wimberly vs. Adams* 423

IMPROVEMENTS. See *Homestead*, 1.

INDICTMENT. See *Criminal Law*, 24, 28, 29, 33.

INDORSEMENT.

See *Principal and Security*, 4, 5, 6.

INFANTS. See *Limitations—Statute of*, 1.

INHERITANCE—RULES OF.

See *Distribution*, 1, 3.

INJUNCTION.

1. The discretion of the chancellor granting an injunction to restrain the defendant from disturbing the com-

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- plainants in the possession of a farm which they claimed to have rented from him, will not be interfered with where the defendant is shown to be insolvent. *Walker vs. Walker et al.*..... 22
2. When a daughter is excluded by her father's will from any interest in his estate, and the executors agree with her husband, in order to prevent a caveat, that said estate, with certain exceptions, shall be equally divided between all his children according to appraisement, each child accounting for any indebtedness existing to the estate, and there was, at the time of said agreement, a suit pending in favor of the executors against such husband on a note, to a portion of which he had a substantial defense, upon which the executors entered a judgment within a few weeks after the contract aforesaid, without his knowledge or consent, he relying upon said agreement, giving no further attention to the same, the enforcement of said judgment will be enjoined. *Dunnahoo vs. Holland, ex'rs, et al.*.. 147
3. Affidavits used upon the hearing of a motion for an injunction must be incorporated in the bill of exceptions; if attached to or embraced in the record, without any identification by the chancellor, the writ of error will be dismissed. *Taylor vs. Cook et al.*..... 215
4. When a bill is filed praying an injunction against the enforcement of a judgment at law, and the judge, after a hearing on a rule to show cause why a temporary injunction until a final hearing should not be granted, refuses the injunction, this court will not interfere to control his discretion unless there be an error of law, or unless the right of the complainant is, under the facts, plain and manifest. *Sharpe et al., vs. Kennedy et al.*..... 257
5. To justify the granting of the injunction in this case, it should have been made distinctly to appear that the money of the wife was put in the firm business without the knowledge or consent of the wife, and as this is not even distinctly stated in the bill, the injunction ought, for this reason, to have been refused. *Bryan & Hunter vs. King*..... 291
6. There is nothing in any of the facts, as they appear from the bill, answers and affidavits, to make out a case of constructive notice; nor do the statements in

the bill, made as they are on information and belief, or the affidavits, or any of the circumstances, make such a case of notice as justifies the judge, under the positive denials in the answers, in granting the injunction and impounding the proceeds of the factory. *Ibid.*

7. As the defendant King, the husband of complainant, was a resident of Pulaski county, and as the property can only be reached by establishing the trust and the complicity of the other defendants with him in the breach of it, the bill was not improperly filed in Pulaski county. *Ibid.*

8. Where a bill was filed praying an injunction against the enforcement of an execution, and it appeared that the plaintiff in the execution had filed a petition for partition of a parcel of land on which was a mill, the petition alleging that the petitioner and A had owned the land in common and had agreed to run the mill in partnership, but that A had sold his interest to B, and that C had set up certain claims against the partnership; that commissioners had been appointed to investigate the accounts and to sell the land; that the commissioners had reported that they had investigated the accounts of the partnership between the petitioner and A, and found the petitioner entitled to \$1,000 00, less \$200 00, and that the firm owed C nothing. A, B and C all excepted to the report, and the issue was tried by a jury, who found in favor of petitioner \$800 00. Petitioner's counsel entered up a judgment against A, B and C for the amount, and execution was levied on the property of C, who filed the bill, insisting that the judgment should have been entered against A alone:

Held, that the judge did not err in granting the injunction. Under the pleadings it is impossible to say what was the real intent of the verdict of the jury, and equity and good conscience requires that there should be a rehearing. *Butt vs. Oneal* 358

9. Where an execution against the mother is levied upon property generally, in which the children have an interest, and neither the interest of the mother nor of the children is clear and ascertained, the sale will be enjoined. *Simms et al. vs. Phillips et al.* 433

10. A suit was brought on a joint and several promissory note against two parties who lived in different counties. No service was made upon the defendant residing in the county of the location of the suit until after the first term. At the second term a verdict and judgment was taken against the non-resident defendant alone :
Held, that the verdict and judgment were illegal, and equity will enjoin their enforcement. In such a case the non-resident defendant has a right to insist upon a verdict and judgment against his co-obligor at the time they are taken against him. *Austell vs. McLarin et al.* 467
11. To entitle the owner of land to an injunction restraining an adjacent proprietor from continuing the improvement of his lot by grading and excavating up to the line of division between the two lots, on the ground that it is a trespass in removing the natural support of complainant's land, it should be made to appear that complainant's soil has been displaced by such excavation, or that it is of such character that it cannot stand by its own coherence, and that complainant's land will be materially damaged thereby. Under the facts in this case, we do not think the chancellor abused his discretion in refusing the injunction. *Morrison vs. Latimer* 519
12. Under the testimony introduced at the hearing, it was not an abuse of discretion in the chancellor to grant an injunction ; but, from the special facts in the case, it should be modified, and it will be so ordered in the judgment. *Hill vs. Sledge, adm'r, et al.* 539
13. The chancellor did not abuse his discretion in granting the injunction in this case. *Central R. R. and Banking Co. vs. Burr & Flanders et al* 553
14. It was no abuse of the discretion of the court to refuse the injunction in this case, or to hold up a larger amount of money than he did. *Dumas vs. Neal et al.* 563
15. Where a bill was filed to enjoin the sale of certain land under an execution for the purchase money therefor, upon the ground that no deed conveying the same to the complainant had been filed and recorded in the clerk's office prior to the levy, and the bill was sanctioned, with the privilege to the defendant to file such

- deed and proceed in the collection of his debt, and an amended bill was presented stating that the defendant had again levied and was proceeding to sell, setting up other grounds for injunction, it will be presumed that the deed has been filed and recorded under the privilege allowed in the first order. *Allen vs. Thornton, adm'r, et al.*..... 694
16. The mere allegation that the title to the land has failed, in the absence of any charge of insolvency on the part of the defendant, is no ground to enjoin the sale under the execution for the purchase money. The complainant should have set up such defense to the suit on the notes, or look to the covenant in the bond for titles. *Ibid.*
17. When the owner sells land, giving bond for titles and taking notes for the purchase money, which are not paid at maturity, he is not entitled to file a bill to cancel the contract and to recover the land, and in the meantime to have a receiver appointed to take charge of the premises on the sole ground of the insolvency of the purchaser, it not appearing that the vendee became insolvent after making the contract of purchase. *Jordan, adm'r, vs. Beal et al.*..... 602
18. An injunction to restrain the collection of a judgment at law, on the ground that there is a good defense to the claim on which the judgment is founded, but that the complainant did not know of said defense until it was too late to avail himself of it before the judgment was obtained, ought not to be granted unless it clearly appears that the failure to acquire the knowledge of it before the trial at law was wholly unmixed with negligence on the part of complainant, or want of attention to the means of information which were within his reach for several years before the judgment. More especially should this be so when, on the day the action at law was instituted, he had notice of facts connected with the matter of the alleged defense that should put a man of ordinary prudence and discretion on inquiry. *Hill vs. Harris et al.*..... 628
19. Where an offer of compromise and settlement of pending litigation is made by the complainant to the defendants, and accepted by them, but the contract thus entered into is not executed by the payment of the

- money, the fact that complainant paid no further attention to the suit, and defendants obtained a judgment against him, affords no ground for an injunction against the enforcement of the execution based on such judgment. *Lowrys vs. Sloan*..... 633
20. Suit was pending in favor of the defendants against the Bank of the Empire State, in which the complainant was a stockholder. In January, 1873, complainant wrote to defendants, proposing, as a compromise, to pay \$2,000 00, in full of his liability. This offer was accepted on March 1st. No money being paid, on the 20th of the following May, defendants entered judgments against said bank for \$10,668 32. Executions were issued, and returns of no corporate property to be found made. They were then levied on the property of the complainant. He sought to enjoin any further proceedings on said executions, because of the aforesaid compromise, and because the bank made an assignment of its assets for the benefit of its creditors, in 1866, and the defendants, with other creditors, filed a bill in the district court of the United States against said assignee, and recovered a decree for the assets then in hand. A part of these assets were certain bonds of the county of Floyd, which were in litigation. The complainant alleged that their value had never been credited on the aforesaid executions. The injunction was granted as prayed for. Subsequently, on the filing of the defendants' answer and affidavits, the chancellor modified said restraining order, so far as to allow the execution to proceed for \$2,000 00:

Held, that the chancellor should hear evidence by affidavits as to the solvency of said bonds received by the defendants, and if the same shall be shown to be solvent, direct that the amount thereof be credited on said executions, and that being done, that the injunction be dissolved. *Ibid.*

INSURANCE.

1. By the provisions of section 2794 of our Code, contracts of insurance must be in writing, and a subsequent agreement to alter such a contract must also be in writing. *Simonton, Jones & Hatcher vs. Liverpool, London and Globe Ins. Co* 76

2. Where the law requires a contract to be in writing, equity will grant relief, if the party complaining has so acted on the parol contract as that it would be a fraud upon him to permit the other to deny the contract. But in such cases the act must be in *pursuance* of the contract, *on the faith of it*, and *induced* by it. *Ibid.*
3. When one had a policy of insurance on a stock of goods in a certain house, and undertook to remove the goods to another house, and whilst actually engaged in such removal was asked (as is alleged) by the agent of the company, if he desired his policy transferred. The insured replied, by all means, if necessary, and the agent consented to the removal, and promised to make the necessary entry on the books. The insured, thereupon, continued the removal, took out no new insurance, and his goods were subsequently lost by fire: *Held*, that this was not such action on the alleged parol agreement as estopped the insurance company from insisting that the contract was not in writing. *Ibid.*
4. An indorsement, amongst others, on a fire insurance policy, stating that in case of a difference of opinion as to the amount of loss or damage, such difference shall be submitted to arbitration, (although such indorsements are referred to in the body of the policy,) does not bar the insured of his right of action without such submission, unless the same is stipulated to be a condition precedent to his right to resort to the courts, or as the only mode by which the loss or damage is to be ascertained, or by which the liability of the company can be fixed. *Liverpool, London and Globe Ins. Co. vs. Creightons.....* 95
5. But if one of the conditions so indorsed and referred to, be that the insurer is not liable for loss or damage by theft, at or after any fire, such stipulation is binding on the insured. *Ibid.*
6. The evidence does not show that the goods and the store in which they were placed, were so taken possession and control of by the company or its authority, as to make it liable for the theft which is charged to have been committed. *Ibid.*
7. Under the evidence, it was no abuse of discretion by the court in refusing a new trial on the ground that

the goods were removed from the house in which they were kept without any necessity therefor. *Ibid.*

8. Where an action was brought by the widow and children of the assured on the following receipt:

"Received of James R. Scurry \$375 00, same being in payment of insurance in the Cotton States Insurance Company; this receipt being binding on said company until policy is received. J. S. RAINES,

"Agent of C. S. Life Ins. Co. of Macon, Ga.

"Baker county, Georgia, September 6, 1871."

And Raines, the agent, signing said receipt, was offered by the defendant as a witness:

Held, that he was competent, not being a party to the original contract with James R. Scurry, nor interested therein. *Scurry et al. vs. Cotton States Life Ins. Co.* ... 624

9. It was competent for the witness to explain what was the understanding of the parties, at the time the receipt was given, of the following words contained therein: "This receipt being binding on said company until policy is received." *Ibid.*

INTEREST. See *Damages*, 8.

INTERROGATORIES. See *Evidence*, 15, 16.

JOINT AND SEVERAL OBLIGATIONS.

See *Injunction*, 10.

JUDGMENTS.

1. Where money is brought into court under an execution issued upon a judgment against a garnishee, the oldest judgment against the defendant takes the fund. *Garrard, ex'r, vs. Moffett*..... 93

2. When a daughter is excluded by her father's will from any interest in his estate, and the executors agree with her husband, in order to prevent a *caveat*, that said estate, with certain exceptions, shall be equally divided between all his children according to appraisement, each child accounting for any indebtedness existing to the estate, and there was at the time of said agreement a suit pending in favor of the executors against such husband on a note, to a portion of which he had a substantial defense, upon which the executors entered a

judgment within a few weeks after the contract aforesaid, without his knowledge or consent, he, relying upon said agreement, giving no further attention to the same, the enforcement of said judgment will be enjoined. *Dunnahoo vs. Holland, ex'r, et al.*..... 147

3. Service of this declaration was acknowledged with a waiver of process and time of filing. This was more than twenty days before the next term of the court. The writ was filed during the second term, and judgment taken the third term:

Held, that the judgment is valid and binding as between the parties, and will not be set aside without proof that the defendant has actually been deceived thereby, or deprived of some available defense. *Weslow vs. Peary & Bros.*..... 210

4. The plaintiff in an attachment may, by serving the defendant with notice and by the other methods provided by law, get a general judgment against the defendant and his property, but in the distribution of money raised from the sale of property attached he is still an attaching creditor, and the money is to be divided according to the priorities of the several attachments, to-wit: according to the date of the levies. *Atlantic and Gulf R. R. Co. vs. Florida Construction Co.* 241

5. The question is this case as to the land having been discharged from the lien of the mortgage judgment, on account of the four years' possession by a *bona fide* purchaser, comes within the principle of the decision in *Akin vs. Freeman*, 49 *Georgia Reports*, 51, even if mortgage judgments are included in the provisions of section 3583 of the Code. *Lee vs. Clark, ex'r.*..... 279

6. The claimant's right to be protected as a *bona fide* purchaser against the lien of the plaintiff's judgment, on account of his four years' possession of the property, cannot be defeated by a levy without the notice which the law requires to be given. *Anderson & Co. vs. Chenney* 372

7. When in a suit pending against an administratrix, there was no issuable plea filed, and the plaintiff took a judgment against the administratrix, personally, and, at a subsequent term of the court, moved that the judgment be set aside, and that he be permitted to take, *nunc pro tunc*, a judgment against the administratrix

- as such, and it was made to appear to the court, that since the original judgment, and only a short time before the application was made, the administratrix had discovered that the note sued on was not the act and deed of the intestate, and that she wished to file a plea of *non est factum* to the same:
Held, that under the facts, the court erred in allowing the plaintiff to take his judgment *nunc pro tunc*.
Emory, ex'x, vs. Smith..... 455
8. A purchaser of a homestead set apart under the act of 1868, takes it subject to any judgments against the head of the family, existing at the time of the purchase, if they be founded on contracts entered into by him previously to the adoption of the constitution of 1868. *Grant vs. Cosby*..... 460
9. Whether such purchaser is subrogated to the right of the debtor to set up the homestead allowed by the Code or by the act of 1823? *Quare. Ibid.*
10. The eighth section of the limitation act of 1869, providing that "all cases of the character mentioned in any section of this act, which have arisen, or in which the right of action or liability has accrued, or the contract has been made, since the 1st day of June, 1865, shall be controlled and governed by the limitation laws as set forth in the Code," does not apply to the right of a plaintiff in execution to levy upon land belonging to the defendant at the date of the judgment, and which he has sold to a third person, who has gone into possession of the same. In such cases, as was decided by a majority of this court in the case of *Akin vs. Freeman*, the obligation of the plaintiff to proceed within four years was suspended by the various acts suspending the statutes of limitation up to the 21st of July, 1868, and there is nothing in the act of 1869, in any of its sections, applying to this right of the plaintiff, or altering this effect of said suspending acts.
Garrard, ex'r, vs. Cody..... 555
11. Possession under an order setting apart a homestead to the wife of the defendant in execution, cannot be taken to subsequent possessions to protect the purchaser, under section 3583 of the Code, from the seizure of said homestead under an execution based on a debt contracted prior to the adoption of the constitution of 1868. *Smith, agent, vs. Ezell*..... 570

12. An injunction to restrain the collection of a judgment at law, on the ground that there is a good defense to the claim on which the judgment is founded, but that the complainant did not know of said defense until it was too late to avail himself of it before the judgment was obtained, ought not to be granted unless it clearly appears that the failure to acquire the knowledge of it before the trial at law was wholly unmixed with negligence on the part of complainant, or want of attention to the means of information which were within his reach for several years before the judgment. More especially should this be so when, on the day the action at law was instituted, he had notice of facts connected with the matter of the alleged defense that should put a man of ordinary prudence and discretion on inquiry. *Hill vs. Harris et al.*..... 628

JUDICIAL SALE.

1. Where an ordinary purchases for the county, land sold for the non-payment of the state and county taxes, at a sum far below its actual value, pays for it out of the county funds, holds it until reimbursed the sum thus paid out, and then conveys it to the county treasurer for an amount far less than its value, who purchases with a knowledge of all of the facts aforesaid, equity will decree a conveyance of said property to purchasers at a sale thereof, under an execution against the former owner, based on a judgment obtained subsequent to the aforesaid tax sale. *Wilkins et al. vs. Benning et al.*..... 9
2. When a purchaser of land at a sheriff's sale failed to take a deed from the sheriff, and twelve years thereafter he applied to the judge of the superior court for an order directing the then sheriff to make the deed : *Held*, that the defendant in execution, or his heirs-at-law, might tender an issue as to the legality and fairness of the sale, and it was error in the court to refuse to permit such an issue. *Clements et al. vs. Lyon, for use...* 126
3. Land having been given in for taxation for the year 1868 by the agent of the estate of a non-resident, he having died in the year 1860, which was subsequently sold by the sheriff for the non-payment of state and county taxes, under an execution for the same against

such agent, the purchaser at such sale acquired a valid title. *Williams, adm'r, vs. Young, adm'r*..... 453

JURISDICTION. See *Apprentice*, 1.

JURY.

1. Under the constitution of 1868 the general assembly has authority to provide for the trial of misdemeanors in county courts and other inferior tribunals, by juries composed of a less number than twelve jurors. *Allen vs. The State*..... 264
2. If a jury in a criminal case be impaneled, and before any evidence is submitted the solicitor general discovers that one of the jurors was of the grand jury that returned the bill, the court may, under section 4681 of the Code, withdraw such juror, unless both sides consent to waive the objection, and if the other juries have been discharged, may continue the case. *Jackson vs. The State* 402
3. It is not a good ground to quash an indictment that, in organizing the grand jury which found it, the judge discharged from the traverse jury a juror summoned and sworn thereon, and placed him upon the grand jury for the term, and that he was chosen foreman thereof. *Sims vs. The State* 495

JUSTICE COURT.

1. Where suit is instituted in a justice court for \$55 00 damages, and the claim as to \$5 00 is abandoned, the right of carrying the case by writ of *certiorari* to the superior court for review exists. *Wright vs. Rutledge*, 194
2. Where on a trial in a justice court of the issue made by counter-affidavits against lien executions in favor of laborers, judgments are rendered for plaintiff, and an appeal is entered or a *certiorari* sued out, the justice has no authority to grant an order that the executions proceed for the purpose of raising money to pay the cost. *Johnson vs. Fox et al.* 270

LAND.

To entitle the owner of land to an injunction restraining an adjacent proprietor from continuing the improvement of his lot by grading and excavating up to

the line of division between the two lots, on the ground that it is a trespass in removing the natural support of complainant's land, it should be made to appear that complainant's soil has been displaced by such excavation, or that it is of such character that it cannot stand by its own coherence, and that complainant's land will be materially damaged thereby. Under the facts in this case, we do not think the chancellor abused his discretion in refusing the injunction. *Morrison vs. Latimer*

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LANDLORD AND TENANT.

Where the issue upon trial was whether the defendant sought to be ejected as a tenant holding over, had, in good faith, abandoned the possession of the premises in dispute at the expiration of his term, and afterwards rented the same from the person under whom he then claimed to hold, or whether he colluded with such person and retained possession in violation of his rent contract with the plaintiff, it was not error in the court to refuse to charge that "if the defendant quit possession, and after the time had expired, wrongfully took possession, he might be an intruder, but the plaintiff cannot recover in this form of action." *Brown vs. Patterson*

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LAWs. See *Constitutional Law*, 3, 4.

LEAVE OF ABSENCE. See *Attorney*, 2, 5, 6.

LEVY. See *Execution*, 1, 2, 4, 5, 8.

LIBEL. See *Slander*, 3—6.

LICENSE.

1. The person to whom the license to peddle is required to be granted, is he who travels and vends the goods and wares, and it is against such person that the process is to be issued, under section 536, Code, when he peddles without license. *Howard & Soule vs. Reid, et al.*

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2. A process issued under said section against A and B, on the ground, that as partners, they did, on, etc., in the county, etc., "by their agent, peddle articles, etc.,

without having obtained license authorizing them to do so," etc., is, upon its face illegal and void. *Ibid.*

LIEN:

1. When a suit is pending in favor of a mechanic, under sections 1963 and 1964 of the Revised Code, and the property on which the lien is claimed to attach has been sold by virtue of a legal process, the purchaser cannot make himself a party to such action and tender an issue denying the character in which plaintiff brings his suit. *DeGive vs. Meador & Tumlin*..... 160
2. The fact that such purchaser has a mortgage on the property does not affect the question. *Ibid.*
3. The sale of the property discharged it from the mechanic's lien, if it existed, and all questions touching the priority or validity of the conflicting liens can, as between contesting creditors, be determined on the hearing of a rule for the distribution of the proceeds of the sale. *Ibid.*
4. Where on a trial in a justice court of the issue made by counter-affidavits against lien executions in favor of laborers, judgments are rendered for plaintiff, and an appeal is entered or a *certiorari* sued out, the justice has no authority to grant an order that the executions proceed for the purpose of raising money to pay the cost. *Johnson vs. Fox et al* 270
5. A mechanic has a lien for the necessary materials furnished in order to comply with his contract, where his services were necessary to fit and put them up, though the articles may have been purchased by him. *Collini vs. Nicolson*..... 560
6. A bill of particulars need not accompany the affidavit foreclosing a mechanic's lien. *Ibid.*
7. Under sections 1963, 1964, Code, a mechanic, in the action therein allowed for the recovery of his claim, and for the enforcement of his lien, may not only obtain a judgment allowing the lien, but also have a general judgment for his claim against the debtor, to which all of his property is subject. *Parish vs. Murphy* 614

LIMITATIONS—STATUTE OF.

1. When the legal title to property is vested in a trustee for infants, who can sue for it, and who fails to do so within the time prescribed by law, so that his right of action is barred, the infant *cestui que trust*, who have only an equitable interest in the property, will be also barred; but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy.
Wingfield, adm'r, et al., vs. Virgin et al. 139
2. In order to defeat a prescriptive title for fraud, the claimant's written evidence of title, under which he went into possession of the property, must be shown to have been fraudulent within his own knowledge, or notice thereof brought home to him before or at the time of the commencement of his possession. *Ibid.*
3. The question in this case as to the land having been discharged from the lien of the mortgage judgment, on account of the four years' possession by a *bona fide* purchaser, comes within the principle of the decision in *Akin es. Freeman*, 49 *Georgia Reports*, 51, even if mortgage judgments are included in the provision of section 3583 of the Code. *Lee vs. Clark, ex'r.* 279
4. Where A gave a promissory note to B for a sum certain, due at a fixed time, as part consideration for a parcel of land, conditioned, however, that before it was to be paid B should take up a note given by him to C, on the purchase of the same land:
Held, that B might recover on A's note, on proof that his (B's) note to C was barred by the statute of limitations. *Jordan et al. vs. Fountain.* 332
5. The eighth section of the limitation act of 1869, providing that "all cases of the character mentioned in any section of this act, which have arisen, or in which the right of action or liability has accrued, or the contract has been made, since the 1st day of June, 1865, shall be controlled and governed by the limitation laws as set forth in the Code," does not apply to the right of a plaintiff in execution to levy upon land belonging to the defendant at the date of the judgment, and which he has sold to a third person, who has gone into possession of the same. In such cases, as was de-

- cided by a majority of this court in the case of *Akin vs. Freeman*, the obligation of the plaintiff to proceed within four years was suspended by the various acts suspending the statutes of limitation up to the 21st of July, 1868, and there is nothing in the act of 1869, in any of its sections, applying to this right of the plaintiff, or altering this effect of said suspending acts. *Garrard, ex'r, vs. Cody*..... 555
6. An attachment was sued out on an account more than four years after it was due; but the debtor had left the state before the bar of the statute had attached, and has never returned to reside in the state. The defendant pleaded the statute of limitations and other pleas: *Held*, that the defendant having appeared and made defense, the proceedings became a suit as in cases of personal service, and the removal of the defendant from the state operated a suspension of the statute from the time such absence commenced. *Whitman vs. McClure et al.*..... 590

MECHANIC'S LIEN. See *Lien*, 1, 2, 3, 5, 6, 7.

MISTAKES. See *Arbitrament and Award*, 1, 2.

MORTGAGE.

- A mortgage on real estate attested by but one witness is not void, and, if a subsequent mortgagee or purchaser buys or takes his mortgage with actual notice of a prior mortgage, he takes subject to it, even though it have but one witness. *Gardner, Dexter & Co. vs. Moore, Trimble & Co.*..... 268

MUNICIPAL CORPORATIONS.

See *Criminal Law*, 39.

NEGLIGENCE. See *Railroads*, 8, 9, 10, 13.

NEW TRIAL.

1. Where there is no error in what the court did charge, or in the refusal to charge the special requests made, and there is no motion for a new trial, this court will not grant a new trial on the ground that the court below failed to charge on certain points which the losing

- party claims were favorable to him, although, under the evidence, such further charge would have been proper. *Moye vs. Waters*..... 13
2. There having been illegal testimony admitted upon the point of undue influence, and the verdict setting aside the will having been rendered by the jury especially upon that ground, and a new trial having been granted by the judge who tried the case, we think it proper that all the issues presented in the case should be submitted to another investigation. *Dennis et al. vs. Weekes*..... 24
3. The only legal discretion which the superior court has to set aside a verdict because it is contrary to the testimony, is in a case where the verdict is decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding. *Patterson vs. Phinizy & Co*..... 33
4. In an action for a *tort*, the question of damages being one for the jury, the court should not interfere with the verdict, unless the damages are either so small or so excessive, as to justify the inference of gross mistake or undue bias. *I bid.*
- .5. Whilst this court is not exactly satisfied with the judgment of the court below, yet as the case is one of granting a new trial so that the parties may have another hearing, we do not think there has been such an abuse of the discretion vested by law in the judge of the superior court to grant a new trial on the ground of the verdict being contrary to the weight of the evidence, as to require a reversal of his judgment. *Pritchett et al. vs. Patterson*..... 133
6. This court will not grant a new trial on the ground of error in the judge in refusing a continuance, if it appear, during the progress of the trial, that the witness for whose absence the continuance was sought was immaterial. *Butler vs. Ambrose, adm'x*..... 152
7. When three persons are tried together for assault with intent to murder and are found guilty, a new trial may, in this state, be granted as to one or more of the defendants, and the verdict stand as to the others. *Seborn et al. vs. The State*..... 164
8. The verdict in this case is fully sustained by the evidence, and the credibility of the witnesses being espec-

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- ially for the consideration of the jury, a new trial ought not to have been granted. *Creighton vs. Hewitt*. 174
Wilson & Co. et al. vs. Wilkins..... 448
Quin et al. vs. Guerry..... 466
Powell et al., adm'rs, vs. Mayor and C. of Atlanta..... 478
Hanson vs. Crawley..... 528
Strickland et al., adm'rs, vs. Wynn..... 600
Cowart vs. Chaffee, Croft & Chaffee..... 606
Brooks vs. The State..... 612
9. Where, by agreement of counsel, a motion for a new trial is to be made and heard in vacation, "provided the same is done in time to take the case to the next July term of the supreme court," and said motion is made and heard in time for such purpose, provided extraordinary diligence had been used, but the writ of error was, in fact, made returnable to the succeeding January term, a motion to dismiss will not be entertained on this ground. Whatever rights the parties had under the agreement referred to, should have been set up in the court below. *Bonner vs. Woodall et al.* 178
10. The decision of the court below in dismissing the motion for a new trial, and in holding that there was not sufficient evidence that it had been filed at the proper time, was not in such conflict with the evidence offered at the hearing as to call for a reversal by this court, the more especially as five years had elapsed since the trial, with several changes in the presiding officers of the court, and there had not been, in the meantime, nor at the term at which it is claimed the motion was made, any verification of the grounds therein taken, nor any motion during that time to have the proper entries made on the papers or on the minutes of the court. *Lee et al. vs. Boddie, adm'r*.... 19^{b7}
11. There was no such abuse of the discretion of the court in granting a new trial in this case as to justify this court in reversing the judgment. *McLaren vs. Lochrane*..... 237
Hines vs. The State..... 301
Lane vs. Cunningham..... 335
Cassels vs. Usry, Sturgis & Co...... 621
12. We do not think there was any abuse of the discretion of the court in requiring the plaintiff to write off the damages given by the verdict, as a condition to

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- avoid the judgment for a new trial. *Clark, ex'r, vs. Lee*..... 284
13. There having been no motion for a new trial, and there being no charge of the court to prevent the jury from making allowance in their verdict for the rent and hire of 1864, and rent for 1865 and 1866, and no refusal to charge any request on that point, we cannot inquire into any alleged error in the verdict for not including the same. *Ferguson vs. Ferguson, ex'r, et al.* 340
14. As it appears doubtful from the record what was the amount of assets in the hands of the present representative for the payment of debts, and the inventory returned by him showing, without further explanation than is contained in the evidence, that a larger credit should have been allowed the defendant below than the jury gave him, we do not think the court erred in granting a new trial; nor do we feel authorized, under the evidence, to order any specific amount to be remitted from the verdict. *McFarlin, adm'r, vs. Ringer et al* 363
15. Where the verdict of the jury is such as is required by the evidence, this court will not reverse the judgment of the court below refusing a new trial for an error in the charge of the court to the jury, which, under the facts proven, could have done the accused no harm. *Rachels vs. The State* 374
Ewing, adm'r, et al. vs. Moses, adm'r 410
Allen vs. Jones 436
Park & Iverson vs. Piedmont and Arlington L. Ins. Co. 510
Central R. R. and Banking Co. vs. Wood 515
Solomon vs. Lochrane 526
Montgomery and West Point R. R. Co. vs. Boring 583
16. When, under the charge of the judge, the jury might count compound interest against a defendant according to law, yet, if the verdict is right, counting only simple interest, it should not be disturbed. *Ewing, adm'r, et al. vs. Moses, adm'r* 410
17. When a motion was made for a new trial, on the ground that a witness (whose affidavit was produced) would testify to certain threats made by deceased against the prisoner, and which the witness had communicated to the prisoner before the rencounter in which the killing occurred, and the movant stated on

- oath that said facts and their importance did not occur to him at the trial, and that he had not informed his counsel of them, he being an ignorant man and knowing nothing of his rights:
- Held*, that as it appeared on the trial that the prisoner, and deceased had each made threats the one to kill the other, and as the evidence now relied on was only cumulative, and could at least only strengthen a line of defense insisted on at the trial, it was not error in the judge to refuse the new trial, as the reason for the neglect to introduce it at the trial was unusual and open to suspicion. *Brown vs. The State*..... 502
18. The newly discovered evidence on the question of a parol license authorizes a new trial, and the jury can determine whether the terms of the license have been complied with. *Winham, King & Aldridge vs. McGuire*..... 578
19. Whilst this court will always be careful to protect railroad companies against excessive damages, still, when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the finding of a jury except when it is apparent that the verdict was the result of passion or prejudice. *Montgomery and West Point R. R. Co. vs. Boring*..... 583
20. In order to render newly discovered evidence a ground for new trial, it must appear that it is not cumulative, and that none of the moving parties, nor their counsel, were aware of it at the trial. *Strickland et al., adm're, vs. Wynn*..... 600
21. Where the jury may, from the evidence, reasonably find that there were any aggravating circumstances, such as gross negligence in the act whereby the injury was inflicted, they may increase the damages beyond a mere compensation for the injury done; and in such a case, where the judge who tries it refuses a new trial, the damages given must be grossly excessive before this court will interfere. *Western and Atlantic R. R. Co. vs. Drysdale* 644
22. As the evidence authorized the master to find that the policy of insurance in controversy was the property of the widow and not the property of the estate, the decision of the chancellor, to whom the issues

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- formed upon the exceptions to the report of the master were submitted without the intervention of a jury, will not be interfered with. *Lawton & Willingham et al. vs. Fish, ex'x*..... 647
- *NON-SUIT. See *Practice in Superior Court*, 6.
- NOVATION. See *Principal and Security*, 3, 6.
- OFFICERS. See *Executions*, 1, 2.
- OPINION OF WITNESS. See *Evidence*, 3-5.
- ORDINARY. See *County Matters*, 1-3.

PARDON.

- Where a defendant in a criminal case gave a promissory note to the solicitor general for the fine imposed on him, and was afterwards pardoned by the governor and the fine remitted, and the same was unappropriated in the manner prescribed by law, such pardon and remission of the fine discharged the defendant from the payment of the note, even if it had been sued and judgment obtained upon it before the fine was remitted. *Parrott, ex'x, vs. Wilson*..... 255

PARTIES.

1. Under the act of 1866 and the constitution of 1868, which secure to a married woman, as her separate estate, all property given to, inherited or acquired by her, the husband cannot assert her rights in reference to such property in his own name. *Dunnahoo vs. Holland, ex'r, et al.*..... 147
2. As the agreement provides that when the estate is ready for distribution, it shall be paid out "to each of the children of the deceased," the husband of one of the daughters cannot, by a bill filed in his own name, enjoin a suit pending against him for the purchase money of property of the estate sold by the executors, for the purpose of setting off against said claim his wife's interest in said estate. For the same reason the other children must be made parties. *Ibid.*
3. As the will conveyed certain lands to the children of complainant, and as the subsequent agreement did not affect them, they were not necessary parties. *Ibid.*

4. When a suit is pending in favor of a mechanic, under sections 1963 and 1964 of the Revised Code, and the property on which the lien is claimed to attach has been sold by virtue of a legal process, the purchaser cannot make himself a party to such action and tender an issue denying the character in which plaintiff brings his suit. *DeGive vs. Meador & Tumlin*..... 160
5. The fact that such purchaser has a mortgage on the property does not affect the question. *Ibid.*
6. A bill in equity filed by A against B, alleging that A, B, C and D, having been partners in trade, did, in 1860, dissolve the partnership, have a full settlement and divide the assets ; that in the division a mistake was made against A, by which the other three partners got of the assets \$3,211 00 which properly belonged to A, and then praying that B be made to account for the one-fourth of said assets thus received by him, is demurrable because the other partners are not joined. *Johnston vs. Preer*..... 313

PARTNERSHIP.

1. As a general rule, a creditor of one of the several partners cannot reach the interest of his debtor by a summons of garnishment upon one who is indebted to the firm ; but when A, having a judgment against a partner, served a summons of garnishment against a bank, having money of the firm on deposit, and the firm filed a bond as claimants of the fund, as provided by the act of 1871, and thus made the partnership a party to the garnishment, the creditor may, under our law authorizing a court of law to give equitable relief, so shape a traverse of the garnishee's answer as to make an issue upon the interest of his debtor in the partnership, at the date of the judgment, or since, and appropriate to the payment of his judgment as much of the deposit in the hands of the garnishee as equals that interest. *Branch, Scott & Co. vs. Adam, Smith & Co*... 113
2. A bill in equity filed by A against B, alleging that A, B, C and D, having been partners in trade, did, in 1860, dissolve the partnership, have a full settlement and divide the assets ; that in the division a mistake was made against A, by which the other three partners got of the assets \$3,211 00 which properly belonged

- to A, and then praying that B be made to account for the one-fourth of said assets thus received by him, is demurrable because the other partners are not joined. *Johnston vs. Preer*..... 313
3. The undivided interest of a partner in the firm property is not liable to levy and sale, even after dissolution, but must be reached by process of garnishment. *Anderson & Co. vs. Cheinney*..... 372
4. Where a plaintiff who sues out a summons of garnishment, signs the partnership name of which he is a member as surety to the bond required by law, and his partner is present consenting thereto, and afterwards comes into court and ratifies the same under seal, and proposes to substitute his signature for that of the firm :
Held, that the amendment to the bond should have been allowed, and whilst we are strongly inclined to the opinion that the bond was binding on the partner individually who thus consented to the signing, we are satisfied it was error to refuse the amendment and to dismiss the garnishment. *Cunningham, assignee, vs. Lamar*..... 574

PASTURE. See *Common of Pasture*, 1.

PEDDLERS. See *License*, 1, 2.

PLEADINGS.

1. Where the plea of the general issue is filed to an action of slander, evidence is admissible thereunder, rebutting the proof introduced by the plaintiff. *Lester vs. Thurmond*..... 118
2. To make a contract illegal as being in aid of the rebellion, as provided by the 17th section of the Vth article of the constitution of this state, it should be alleged with whom the contract was made, and the terms of it, and that it was made with the intention and for the purpose of aiding and encouraging the rebellion, and the consideration therefor should be alleged, so that the court could determine from the facts whether the contract was made with the intention and for the purpose of aiding the rebellion. *Manufacturers' Bank of Macon vs. Ellis*..... 154
3. Where no plea of *lis pendens* is filed, a record showing the pendency of a former suit between the same

- parties, involving the same issue, is inadmissible.
Brown vs. Patterson, ex'r..... 229
4. A plea that the plaintiff in a suit was dead at the time of the commencement of the action may be filed at any time before judgment, it being made to appear that the fact pleaded has just come to the knowledge of the defendant. *Jernigan, ex'x, vs. Carter..... 232*
5. A plea in abatement and a plea of the general issue may be both filed at the same time, but the plea in abatement should be first disposed of. *Ibid.*
6. Under a proper construction of sections 3049, 3369 and 3406 of the Code, when considered together, an action cannot be brought in the superior court against a railroad company by merely serving the written notice and filing the same in the clerk's office without other pleadings. *Hodges vs. Atlantic and Gulf R. R. Co..... 244*
7. Where an action is brought on an account for services rendered, a recovery may be had on a special contract where the bill of particulars sets out fully the terms. *Johnson vs. Quin, adm'r..... 289*
8. When, during the trial of a suit on the law side of the superior court, the defendant was absent, and his attorney moved to file, as a plea, a certain bill in equity which the defendant had presented to the judge, asking an injunction of the common law suit, which bill was sworn to according to the usual form for verifying bills in chancery, but which the judge had not acted on, and the motion was denied on the ground that, though the facts set forth in the bill made a good plea, they were not sworn to as required by law:
Held, that this was error, as there was a substantial compliance with the law for the verification of pleas. *Clark vs. Croft..... 368*
9. It is a good plea in defense to a note given for land, that a bond was given by the plaintiff to make a good title to the land on the payment of the price, free from *liens and incumbrances*, and that at the time of the making of the bond certain liens were known to exist; that the true title to the land was in several persons, of whom plaintiff was one; that it was the intent of the parties that the plaintiff should take up the liens and procure a title from the others before payment of

the note; that the liens were still subsisting and the title from the other joint owners still not obtained, and that the defendant had offered and was still willing and ready to pay on compliance with the contract. *Ibid.*

10. A plea which sets up that the note sued on was given for a tract of land, for which the plaintiff executed his bond for titles, in the usual form, to the defendant; that the plaintiff had no title to the land and is insolvent; and which offers to deliver up to be canceled the bond; and prays the rescission of the contract aforesaid, is not demurrable. *Sizemore vs. Pinkston*..... 398
11. The defendant can obtain the same relief in a court of law, as to the rescission of the contract, as he could in a court of equity, and have the verdict so moulded as to compel the defendant to surrender the possession of the land, and to place the parties in the same condition in which they were before the contract was made. *Ibid.*
12. Suit was brought against the "Montgomery and West Point Railroad Company, otherwise called the Western Railroad Company." Objection was made to the form of the action. It appeared that the legislature of the state of Alabama had authorized the surrender of the charter of the M. and W. P. R. R. Co., and its incorporation into the W. R. R. Co.; that whatever name this company had, it regularly used the depot at West Point, in the state of Georgia, known as the M. and W. P. R. R. depot; that by act of the general assembly of the state of Georgia, passed in 1837, the M. and W. P. R. R. Co. was incorporated, and its office for the service of writs, etc., fixed at West Point:
Held, that the allegation "otherwise called the Western Railroad Company" was surplusage, and need not be proved. *Montgomery and West Point R. R. Co. vs. Boring* 582

PRACTICE IN SUPERIOR COURT.

1. The court should always confine itself to its appropriate functions on the trial of cases, by an impartial administration of the law applicable to the facts before it, and leave the jury to perform their appropriate functions, without any indication as to what it may

- think their verdict should be, or what may be its opinion of the evidence, or the credibility of the witnesses. *Moody, adm'r, vs. Metcalf et al.* 128
2. Where a motion was made to open a judgment, under the act of 1868, which was demurred to on the ground that the act was unconstitutional, and the demurrer was overruled:
Held, that it was not error in the judge, when the case was called for trial, to dismiss the proceedings on the ground that upon an inspection of the declaration and pleas, it appeared that the equities between the parties had been fully inquired into and settled on the trial at which the judgment was rendered. *Bonner vs. Martin, adm'r* 195
3. Service of this declaration was acknowledged with a waiver of process and time of filing. This was more than twenty days before the next term of the court. The writ was filed during the second term, and judgment taken the third term:
Held, that the judgment is valid and binding as between the parties, and will not be set aside without proof that the defendant has actually been deceived thereby, or deprived of some available defense. *Weslow vs. Peary & Bros* 240 210
4. If a jury in a criminal case be impaneled, and before any evidence is submitted the solicitor general discovers that one of the jurors was of the grand jury that returned the bill, the court may, under section 4681 of the Code, withdraw such juror, unless both sides consent to waive the objection, and if the other juries have been discharged, may continue the case. *Jackson vs. The State* 402
5. When a defendant pleads that he is security to the note sued on, and that it has been altered without his knowledge or consent, he is not entitled to take a verdict, on the plaintiff's closing his case after introducing the note in evidence without other testimony. *Hanson vs. Crawley* 528
6. If a motion to non-suit should have been sustained in that stage of the case, yet if the defendant, after it is overruled, proceeds, and both he and plaintiff introduce evidence on the issue made by the plea, and the evidence is sufficient to sustain a verdict for plaintiff,

it will not be set aside and a new trial granted because of the refusal by the court to grant the non-suit. *Ibid.*

PRACTICE IN SUPREME COURT.

1. Where there is no error in what the court did charge, or in the refusal to charge the special requests made, and there is no motion for a new trial, this court will not grant a new trial on the ground that the court below failed to charge on certain points which the losing party claims were favorable to him, although under the evidence such further charge would have been proper. *Moye vs. Waters*..... 13
2. A writ of error does not lie to this court from the judgment of a county court. *Bradford vs. Preer et al.*..... 168
3. A writ of error does not lie to this court from the city court of Savannah to set aside a verdict of a jury, either because it is contrary to the evidence or because it is not such a verdict as the jury might lawfully render under the pleadings. A writ of error only lies from the decision, sentence or decree of the court. *Roach vs. Sulter*..... 169
4. Where, by agreement of counsel, a motion for a new trial is to be made and heard in vacation, "provided the same is done in time to take the case to the next July term of the supreme court," and said motion is made and heard in time for such purpose, provided extraordinary diligence had been used, but the writ of error was, in fact, made returnable to the succeeding January term, a motion to dismiss will not be entertained on this ground. Whatever rights the parties had under the agreement referred to, should have been set up in the court below. *Bonner vs. Woodall et al.*... 117
5. An exception to the judgment of a chancellor attaching the defendant in an equity cause for the violation of an injunction cannot be brought to this court under the special statute applicable to injunctions, appointment of receivers, and other extraordinary remedies in equity. *Williams vs. Lampkin et al.*..... 214
6. Affidavits used upon the hearing of a motion for an injunction must be incorporated in the bill of exceptions; if attached to or embraced in the record, without any identification by the chancellor, the writ of error will be dismissed. *Taylor vs. Cook et al.*..... 215

7. The writ of error to a decision of the superior court must be returned to the next term of the supreme court after such decision is rendered, after allowing the various times prescribed by law for service, filing, transmission, etc., otherwise it will be dismissed. *Peacock, ex'r, vs. Eubanks*..... 216
8. It is the duty of counsel for plaintiff in error to prepare and attach to the bill of exceptions the certificate for the judge to sign, which such officer may modify as may seem to him proper under the facts of the case. *Billups, adm'r, vs. Baynes*..... 217
9. Where the judge attaches to the bill of exceptions the following certificate:
- “May 24th, 1873.
- “The court signs the foregoing as a bill of exceptions, with leave to attach the certificate prescribed, but the court does not certify the facts recited in the grounds for new trial to be correct, nor does it certify the facts stated in assignment of errors to be correct; these are but allegations made by one party.
- “J. JOHNSON, Judge, etc.
- “Below put certificate.”
- And leaves a blank space for such certificate, followed by a second signature, and counsel for plaintiff in error fill up such blank with the certificate prescribed by statute, dating the same June 1st, 1873:
- Held*, that the date of the signing of the bill of exceptions, as recognized by this court, is May 24th, 1873, and the filing in office and service upon opposite counsel must be made within fifteen and ten days from such date, respectively. *Ibid.*
10. By consent of all the counsel interested in the cases upon the docket for a particular circuit, the order in which the cases are entered will be varied on the call, for the sake of convenience. *Hines & Hobbs vs. Brunswick and Albany R. R. Co. et al.; Brunswick and Albany R. R. Co. et al. vs. First Mortgage Bondholders et al.; Clews & Co. vs. Brunswick and Albany R. R. Co.*..... 218
11. Upon special cause shown, cases will be transferred to the heel of the entire docket. *Ibid.*
12. Under no circumstances will cases belonging to one circuit be injected into another circuit, or between

- other circuits. Injunction cases are governed by a law peculiar to them. *Ibid.*
13. Where exception is taken to a judgment refusing an injunction under the act of 1870, the clerk shall, within fifteen days from the service of the bill of exceptions, make out a transcript of the record and transmit the same *immediately* to the supreme court then in session, and if not in session, then to the very next session. If the transmission is not immediately made the writ of error will be dismissed. *Pope, adm'r, vs. Tiffts, et al.; Lockett et al. vs. Kemp*..... 219
14. Where a trial was had in the county court, and the writ of *ceteriorari* sued out thereto, the hearing upon which was had before the judge of the superior court at chambers, the bill of exceptions to his judgment need not be served upon the solicitor general of the circuit. Service upon the solicitor of the county court is sufficient. *Allen vs. The State*..... 264
15. Where the sole exception is to the decision of the Court sustaining a demurrer to a plea, and neither the record nor bill of exceptions sets forth said plea, the judgment will be affirmed. *Kemp et al. vs. Lowe, ordinary* 273
16. The bill of exceptions or the motion for a new trial, should show that testimony which is claimed to be illegal was objected to by the complaining party. A mere statement to that effect in the brief of the evidence is not sufficient. *Selma, Rome and Dalton R. R. Co. vs. Redwine, adm'x*..... 470
17. Where exception was taken to the judgment of the chancellor enforcing a decree of the court by attachmens for contempt, and neither the record nor the bill of exceptions sets forth said decree, the judgment of the court below will be affirmed. *Gunn vs. Calhoun..* 501
18. When the questions made by the bill of exceptions have been before decided by this court adverse to the plaintiff in error, damages will be awarded. *Brown vs. Brown, ex'r*..... 554
19. Where a person summoned as a juror claims exemption from such duty under an act of the general assembly, the decision of the court refusing such right is one to which a writ of error will lie. Though such

- person may have served his time as a juror, yet his name is still in the jury box; and, in addition to this, the decision affects the administration of public justice. *Ex parte Conner* 571
20. Where cross-bills of exception were filed and the record in the case was sent up with the bill of exceptions, which arrived in time for the last term of this court, and no record accompanied the exceptions which were returned to this term, the writ of error to this term will not be dismissed for the absence of a record, but the case will be heard on the record returned to the last term. *Scurry et al. vs. Cotton States Life Ins. Co.* 624
21. This being a case arising out of the same judgment of the circuit court—which was excepted to and reversed in *Tennille vs. Phelps et al.*, 49 *Georgia Reports*, 532—the judgment of reversal then pronounced necessarily operates as a reversal as to the parties to this bill of exceptions. *Harrison et al., ex'rs, vs. Belton et al.* 638

PRESCRIPTION.

1. The right of common of pasture on wild lands cannot, in Georgia, be founded on the fact that one's cattle have been pastured on such lands for twenty or thirty years. *Davis et al. vs. Gurley* 74
2. When the legal title to property is vested in a trustee for infants, who can sue for it, and who fails to do so within the time prescribed by law, so that his right of action is barred, the infant *cestui que trusts*, who have only an equitable interest in the property, will be also barred; but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. *Wingfield, adm'r, et al. vs. Virgin et al.* 139
3. In order to defeat a prescriptive title for fraud, the claimant's written evidence of title, under which he went into possession of the property, must be shown to have been fraudulent within his own knowledge, or notice thereof brought home to him before or at the time of the commencement of his possession. *Ibid.*
4. The fact that a canal company has used for upwards of twenty years a break or opening in the bank of the

- canal where it runs through a swamp or pond, for the purpose of supplying the canal with water from the swamp as a reserve, and that there has also been during that period, at certain times, an outflow of water from the canal through the break, does not constitute such a prescriptive right in the company as to entitle it to increase intentionally, or by negligence, such outflow, so that it will cause the water to escape from the swamp, and submerge the land of an adjacent proprietor. *Savannah and Ogeechee Canal Co. vs. Bourquin*..... 378
5. To entitle different possessions to be tacked so as to make out the time required to establish a title by prescription to land, it is necessary to show that they are successive possessions. But this rule does not apply to the case of a claim to an easement on the land of another, arising out of the facts recited in the ensuing head-note of this syllabus. *Winham, King & Aldridge vs. McGuire* 578
6. A licensee who, under a parol license to enjoy an easement of a permanent nature upon the land of another, such as to back water by the erection of a mill dam, expends money and makes investments in pursuance thereof, is not liable to an action of trespass for erecting the dam either by the party giving the license or any subsequent owner of the land which is overflowed; nor is any subsequent owner or possessor of the mill and dam liable to an action for keeping up such dam. *Ibid.*
7. The right to such an easement is not forfeited for non-user, unless it be for a period sufficient to raise the presumption of a release or abandonment. *Ibid.*

PRESUMPTION. See *Husband and Wife*, 1.

PRINCIPAL AND AGENT.

1. Land having been given in for taxation for the year 1868 by the agent of the estate of a non-resident, he having died in the year 1860, which was subsequently sold by the sheriff for the non-payment of state and county taxes, under an execution for the same against such agent, the purchaser at such sale acquired a valid title. *Williams, adm'r, vs. Young, adm'r*..... 453

2. The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal *Atlantic and Gulf R. R. Co. vs. Jacksonville, Pensacola and Mobile R. R. Co.* 458
3. Where an action was brought by the widow and children of the assured on the following receipt :
 " Received of James R. Scurry \$375 00, same being in payment of insurance in the Cotton States Insurance Company; this receipt being binding on said company until policy is received. J. S. RAINES,
"Agent of C. S. Life Ins. Co. of Macon, Ga.
 "Baker county, Georgia, September 6, 1871." And Raines, the agent, signing said receipt, was offered by the defendant as a witness :
Held, that he was competent, not being a party to the original contract with James R. Scurry, nor interested therein. *Scurry et al. vs. Cotton States Life Ins. Co.* ... 624
4. It was competent for the witness to explain what was the understanding of the parties, at the time the receipt was given, of the following words contained therein : "This receipt being binding on said company until policy is received." *Ibid.*

PRINCIPAL AND SECURITY.

1. When A was arrested on a charge of assault with intent to murder, and gave bond to appear at the superior court to answer, etc., and upon the finding of a true bill, the judge issued a bench warrant, under which A was arrested and continued in the custody of the sheriff until the trial, during the progress of which he escaped from the custody of the sheriff :
Held, that the securities of the bond taken by the magistrate were discharged by the subsequent arrest under the bench warrant, and are not liable on their bond. *Smith, governor, vs. Kitchens et al.* 158
2. The advice given by the solicitor general to the security on the recognizance to have the principals in court as soon as he could get them there, with the assurance that the judgment of forfeiture would not be entered until next morning, may have misled the security so as not to have applied to the court for indulgence until next day, or to employ counsel for that purpose ; and

- this, with the fact that the security did have the principals in court by the jury hour next morning, and so announced to the court, was sufficient to authorize the setting aside the judgment of forfeiture, although it had then been entered on the minutes. *Woodall et al. vs. Smith, governor*..... 171
3. Where a note for money borrowed was given in 1860, with two securities thereto, which was renewed on February 14th, 1863, the name of one of the securities being omitted therefrom with the knowledge and consent of the other security, there was no such novation of the original contract, in the legal sense of the term, either as to the maker or the remaining security, as would bring it within the operation of the ordinance of 1865. *Bonner vs. Woodall et al.*..... 177
4. A, for B's accommodation, indorsed B's note to C. It was agreed between all the parties at the time of the indorsement that B should give to C a mortgage upon his (B's) stock of goods, as a security for the debt, and this was done as agreed. But C failed to record the mortgage, and at the end of three months canceled it and took another:
Held, that this discharged the security. *Atlanta National Bank vs. Douglass*..... 205
5. The security is discharged, notwithstanding it may be affirmatively shown that the mortgage, though duly recorded and not canceled, would have been no protection to the security by reason of older liens. *Ibid.*
6. Where a note was given to the plaintiff, indorsed by the defendant, for money borrowed by the maker thereof, and subsequently said note was given up, a new note by the maker for a larger amount, including said indebtedness, being substituted therefor, and suit is brought against the defendant for the amount originally loaned, as money had and received for the use of the plaintiff, and the defendant claims to be discharged from all liability therefor by the delivering up of the first note, the court should have charged the jury that if they believed from the evidence that the original note was given up, the defendant's name erased therefrom, and a new note given by the maker, including the amount due on the original note, secured by mortgage on the maker's property, the liability of

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- the defendant, as indorser on the original note, was at an end. *Rhodes vs. Hart*..... 320
7. Where a judgment was obtained against a principal and security on a promissory note, and an appeal was entered by the defendants, the security filing a plea of *non est factum*, and pending the appeal it was agreed by the plaintiff that if the security would withdraw his appeal and permit the judgment below to stand, he, the plaintiff, would look to the principal alone for the payment of the judgment:
Held, that on the withdrawal of the appeal the security was relieved, and that he might set up this relief by an affidavit that the execution issued on the original judgment was proceeding illegally, and setting forth the facts of the agreement and his action thereon.
Wimberly vs. Adams 423
8. When a defendant pleads that he is security to the note sued on, and that it has been altered without his knowledge or consent, he is not entitled to take a verdict on the plaintiff's closing his case after introducing the note in evidence without other testimony.
Hanson vs. Crawley 528
9. If the defendant put in evidence the testimony of the principal as to what he said to the payee at the time the words were added to the note which are complained of, for the purpose of showing that he, the principal, was to be exclusively bound for the additional liabilities caused by those words, it is competent for the plaintiff, in rebuttal thereof, to prove all that the principal said at the time, as part of the *res gestae*. And if such proof be not competent to charge the security with knowledge of and consent to the change, he should ask the court, by its charge to the jury, or when the evidence is admitted, so to limit its effect. *Ibid.*

PROMISSORY NOTES.

- Where the husband transfers to his creditor a promissory note before its maturity, which belongs to and is payable to his wife, or bearer, and the wife sues the creditor in trover for the note—it was not error for the court to refuse to charge the jury, a written request of plaintiff—that the transfer did not divest the title to the note. The request should have contained the qualification that the jury should believe from the evidence

- that defendant had notice that the note was the property of the wife. *Moye vs. Waters*..... 13
2. Where a note was given to the plaintiff, indorsed by the defendant, for money borrowed by the maker thereof, and subsequently said note was given up, a new note by the maker for a larger amount, including said indebtedness, being substituted therefor, and suit is brought against the defendant for the amount originally loaned, as money had and received for the use of the plaintiff, and the defendant claims to be discharged from all liability therefor by the delivering up of the first note, the court should have charged the jury that if they believed from the evidence that the original note was given up, the defendant's name erased therefrom, and a new note given by the maker, including the amount due on the original note, secured by mortgage on the maker's property, the liability of the defendant as indorser on the original note, was at an end.
Rhodes vs. Hart 320
3. Where A gave a promissory note to B for a sum certain, due at a fixed time, as part consideration for a parcel of land, conditioned, however, that before it was to be paid B should take up a note given by him to C, on the purchase of the same land :
Held, that B might recover on A's note, on proof that his (B's) note to C was barred by the statute of limitations.
Jordan et al. vs. Fountain 332

RAILROADS.

1. On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of his co-employees, it was error in the court to permit the plaintiff to testify before the jury, that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life. *East Tennessee, Virginia and Georgia R. R. Co. vs. Duggan*.. 212
2. Under a proper construction of sections 3049, 3369 and 3406 of the Code, when considered together, an action cannot be brought in the superior court against a railroad company by merely serving the written notice and filing the same in the clerk's office without

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- other pleadings. *Hodges vs. Atlantic and Gulf R. R. Co.*..... 244
3. Where a railroad company retains the trunk of a passenger under its lien for her fare, it is liable for any articles that may be taken therefrom whilst in its possession. *Southwestern R. R. Co. vs. Bently*..... 311
4. Where the witnesses state that the land taken by a railroad company is worth as land only \$6 00 or \$7 00 per acre, but in the form and for the purpose it is taken, it is worth to the balance of the land from \$30 00 to \$50 00 per acre, the presumption is that the increased valuation is put upon it on account of the damages done to the balance of the land; and no other damages should be allowed than what are specially stated and proved as further and additional damages. *Selma, Rome and Dalton R. R. Co. vs. Redwine, adm'r*..... 470
5. Where the witnesses give the value of the land appropriated by the road, on the basis above stated, the damages cannot be increased by general statements that the value of the land as taken, with the incidental advantages and disadvantages done to the land by the road, make a sum greater than what the value of the land thus estimated amounts to. *Ibid.*
6. The special damage suffered by the plaintiff's orchard may be allowed as proven. *Ibid.*
7. Interest in such cases cannot be given except as part of the damages, and then only from the time when the damage occurred. *Ibid.*
8. If the conductor of a railroad train agree to put a passenger off at a particular place, which is not a station or regular stopping place, it would be the duty of the conductor to stop the train at that place, so that the passenger could get off in safety. This rule would apply although the passenger had a ticket only to the last station passed before reaching the place at which he was to be put off. *Western R. R. Co. vs. Young, adm'r*... 489
9. If the agreement with the conductor was that the train would not be stopped, but its speed only slackened, it was not error in the court to charge the jury that the speed of the train should be so slackened that the passenger could get off safely. Nor was it error to give such a charge as a qualification to a request of defend-

ant, "that if the train did slack up so that plaintiff might have gotten off safely, then although plaintiff was injured in getting off, defendant is not liable in damages." *Ibid.*

10. Under the facts of this case it was not error in the court to refuse to charge the jury "that if the train slackened up so that plaintiff might have gotten safely off, it was for plaintiff to determine whether he would get off or not; and if he did get off, and in so doing was injured, he is not entitled to recover." *Ibid.*
11. A railroad company which succeeds to the rights and privileges conferred upon another by its charter, becomes also subject to the same liabilities. *Montgomery and West Point R. R. Co. vs. Boring*..... 582
12. In an action against a railroad company for an injury to the person, damages traceable to the act, but not its legal or natural consequence, are too remote and contingent. *Ibid.*
13. It is error for the court to charge the jury that certain enumerated facts, if proven, would constitute negligence. Negligence is a question of fact, of which the jury are to judge from the evidence and not a question of law. *Ibid.*
14. Whilst this court will always be careful to protect railroad companies against excessive damages, still, when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the finding of a jury except when it is apparent that the verdict was the result of passion or prejudice. *Ibid.*

See *Carriers*.

REBELLION. See *Constitutional Law*, 1.

RECEIVER. See *Injunction*, 17.

RECOMMENDATION TO MERCY.

See *Criminal Law*, 1, 7, 8, 18.

RECORDS. See *Clerk of Superior Court*, 1.

RELIEF ACT OF 1868.

1. A judgment cannot be opened and reduced according to the equities between the parties under the act of 1868, if, when it was obtained, the defendant pleaded the ordinance of 1865, and a verdict of a jury then fixed the amount due, according to the principles of equity. *Bonner vs. Martin, adm'r*..... 195

2. Where a motion was made to open a judgment, under the act of 1868, which was demurred to on the ground that the act was unconstitutional, and the demurrer was overruled:

Held, that it was not error in the judge, when the case was called for trial, to dismiss the proceedings on the ground that upon an inspection of the declaration and pleas it appeared that the equities between the parties had been fully inquired into and settled on the trial at which the judgment was rendered. *Ibid.*

3. When a judgment was obtained in 1866 on a promissory note made in 1860, and under the relief act of 1868 the defendant filed an affidavit to reduce the debt, on the ground that in 1863 he had tendered to the plaintiff the whole amount due, which he refused, and that the defendant had thereby lost the sum tendered:

Held, that there was nothing in the facts stated creating such an equity between the parties as justified the reduction of the debt, and it was not error in the court to order the execution to proceed. *Pipkin vs. Grace.*.. 228

REMAINDER. See *Trusts*, 3, 4.

RESCISSION. See *Sales*, 2.

RES GESTÆ. See *Criminal Law*, 14, 25.

RIPARIAN RIGHTS. See *Water*.

SALES.

1. Where an action was brought on notes given for guano sold, and the defense set up was that the article was worthless and not reasonably suited to the use intended, upon which point the evidence was conflicting, and it appeared that at the time of the sale plaintiffs' agent delivered to defendants a jar containing some of

said guano, telling them to keep it until the crop matured, and if dissatisfied they might select any chemist in the United States to analyze the sample, and if it did not come up to plaintiffs' published analysis they need not pay for the same, but the jar was lost and its contents never were analyzed :

Held, that it was error in the court to refuse to charge the jury "that to entitle the defendants to a verdict in their favor they must show clearly that their bad crop resulted from the worthlessness of the guano."

Wilcox, Gibbs & Co. vs. Howard et al..... 298

2. Howard, under an agreement with Barrett, bought Barrett's land at sheriff's sale, paying about \$2,000 00, and agreed that Barrett might redeem it by paying him the money he had advanced. Barrett afterwards, with Howard's consent, sold the land to Allen for \$3,000 00, on time, Howard making to Allen a bond for titles and taking his note for that amount. A dispute having arisen between Barrett and Howard as to the final profit on this sale, it was found by arbitrators to belong to Barrett, whereupon Howard gave to Barrett two notes, one for \$100 00, and the others for the balance, to be paid when the notes of Allen were collected. The \$100 00 note was traded to the plaintiff, who knew all the facts, as stated. Afterwards Allen became insolvent, and with Barrett's consent, Howard took back the land and gave up Allen's notes. The plaintiff sued Howard on the \$100 00 note. It was in proof that Allen was insolvent, and that the land was not worth more than the \$2,000 00 originally paid by Howard, though Howard admitted Allen had let him have six light bales of cotton as rent at the rescission of the sale, but there was no proof of the value of the cotton. The court charged the jury that if the trade with Allen was canceled without the knowledge of the plaintiff, the jury should find in his favor:

Held, that this was error, unless qualified, as follows: Provided, the land and cotton were worth more than \$2,000 00, with interest till the cancellation, in which case the plaintiff would be entitled to the excess, up to the amount of his \$100 00 note, with interest.

Howard vs. Duncan..... 550

SAMPLE—SALE BY. See *Sales*, 1.

SCALING ORDINANCE.

1. Under the charter of the Manufacturers' Bank of Macon, it had no authority, in the year 1862, to issue bills intended to be redeemed in Confederate treasury notes, and therefore the ordinance of 1865 is inapplicable to such contracts. *Manufacturers' Bank of Macon vs. Ellis*..... 154
2. Where a note for money borrowed was given in 1860, with two securities thereto, which was renewed on February 14th, 1863, the name of one of the securities being omitted therefrom with the knowledge and consent of the other security, there was no such novation of the original contract, in the legal sense of the term, either as to the maker or the remaining security, as would bring it within the operation of the ordinance of 1865. *Bonner vs. Woodall et al.*..... 177
3. Where a note was given in November, 1862, for Confederate money borrowed, payable two years after date, and the jury, in adjusting the equities between the parties according to the ordinance of 1865, gave a verdict rating the value of Confederate money neither at the date of the note nor at its maturity, but at a date intermediate between the making and the maturity of the same:

Held, that while the verdict does not fully conform to our views of the rights of the plaintiff, yet, under the rule that in such cases the jury have a wide discretion, this court will not disturb it. *Mitchell vs. Butt et al.* 274

SCIRE FACIAS.

When a recognizance has been forfeited, the law requires that the clerk shall issue a *scire facias* thereon, returnable to the next term of the court; and if such officer allow the next term to pass, and then issued a *scire facias*, it was error in the court to render judgment thereon against the security at the succeeding term.

Wright vs. The State..... 524

SERVICE.

1. Where, at the second term after the declaration was filed, the court passed an order allowing the plaintiff further time to perfect service on the defendant, who was a citizen of the county in which the suit was pend-

- ing, but had been temporarily absent from the United States, and service was made in accordance with said order, it was error, two years thereafter, when the case was called for trial, to dismiss it for want of service. *Dobbins vs. Jenkins*..... 203
2. When the attention of the court was called to the case at the second term thereof after the institution of the suit, it would have been its duty to have dismissed it for want of service, unless it had been made to appear that diligence had been exercised by the plaintiff. *Ibid*.
3. The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal. *Atlantic and Gulf R. R. Co. vs. Jacksonville, Pensacola and Mobile R. R. Co.*..... 458
4. The filing of a declaration in the clerk's office, when service has been perfected as required by law, will be considered as the commencement of the suit, *aliter* where there has been no service. *Ferguson vs. New Manchester Manufacturing Co.*..... 609

SETTLEMENT. See *Injunction*, 19, 20.

SHERIFF.

1. When a purchaser of land at a sheriff's sale failed to take a deed from the sheriff, and twelve years thereafter he applied to the judge of the superior court for an order directing the then sheriff to make the deed: *Held*, that the defendant in execution, or his heirs-at-law, might tender an issue as to the legality and fairness of the sale, and it was error in the court to refuse to permit such an issue. *Clements et al. vs. Lyon, for use*... 126
2. It does not necessarily follow because the sheriff would be liable under the law in an action on the case against him, that he would be liable for an attachment for contempt of court. The latter proceeding would depend on the good faith of his conduct in view of the circumstances under which he acted, of which the court is to judge. *Heard vs. Callaway*..... 315
3. The question made by the affidavit of illegality being one of doubt and difficulty for even judicial officers to decide, it was not error in the court to decline to ren-

- der a rule absolute against the sheriff for refusing to disregard it. *Ibid.*
4. Where the answer of the sheriff to a rule is evasive, the discretion of the court below in making the same absolute will not be interfered with. *Willis vs. Powell.* 475
5. Service of summons of garnishment on the defendant in execution, is not a ground of which the sheriff can avail himself in an answer to a rule against him to show cause why he should not pay the money due on the *fi. fa.* *Cowart, sheriff, vs. Chaffee, Croft & Chaffee.* 606
6. There was no abuse of the discretion of the court, under the evidence contained in the record, in refusing to grant the rule absolute against the sheriff. *Chambers vs. Mayo, sheriff.....* 610

SLANDER.

1. An attorney at law is protected by his privilege from liability on account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. *Lester vs. Thurmond.....* 118
2. Where the plea of the general issue is filed to an action of slander, evidence is admissible thereunder rebutting the proof introduced by the plaintiff. *Ibid.*
3. The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication, but it cannot enlarge the meaning of words plainly expressed therein. *Park & Iverson vs. Piedmont and Arlington Life Ins. Co.....* 510
4. Where justification was pleaded to an action for a libel which was neither ambiguous nor uncertain, it was not error in the court to charge the jury that they would not determine whether the innuendoes were true or false, but would consider whether the defendant had proved that the published language was true. *Ibid.*
5. Whether the language of the publication did or did not charge the plaintiffs with having embezzled the defendant's money, or whether it charged them with having fraudulently appropriated the same, were questions of fact for the jury to determine from the plain, unambiguous language of the alleged libel itself, without any intimation or expression of opinion by the

court, as to what offense the publication charged, or whether any was charged. *Ibid.*

6. Where the publication charges the plaintiffs, who were insurance agents, with failure to remit premiums collected, it was error in the court to refuse to charge the jury that if the plaintiffs, in good faith, claimed an amount due them as commutation, which defendant refused to allow, and therefore plaintiffs did not settle, then they cannot be truly charged with embezzlement, or fraudulently appropriating the money of defendant to their use, although, on a trial afterwards, it may have been determined that they were not entitled to such demand. *Ibid.*

SOLICITOR GENERAL.

See *Practice in Supreme Court*, 14.

SPECIFIC PERFORMANCE. See *Equity*, 2, 13.

STATUTE OF LIMITATIONS.

See *Limitations—Statute of*.

STOCK SUBSCRIPTION. See *Contracts*, 6.

TAX COLLECTOR. See *Taxes*, 3.

TAXES.

1. The ordinary has no authority to purchase land for the benefit of the county, sold for non-payment of the state and county taxes. *Williams et al. vs. Benning et al.* 9
2. The ordinary has no authority to pay the city taxes, on property purchased as aforesaid, out of the county funds. *Ibid.*
3. A tax collector who has settled his tax digest with the state and county, may use the executions he has issued against delinquent tax-payers to reimburse himself by collecting from them their unpaid taxes, but he is not entitled to the immunity from judicial interference which the law provides for the state, and he can only collect such tax as is legally due. *White vs. The State et al., for use* 252

4. One who comes into this state after the first day of April of any year, and has no property here before or at the time, is not liable to pay tax to the state or county for that year. *Ibid.*
5. If one has duly given in all his taxable property to the tax receiver at its proper value, and the tax collector assess a double tax against him for other property which the tax-payer does not in fact have, such double tax is illegal. *Ibid.*
6. Land having been given in for taxation for the year 1868 by the agent of an estate of a non-resident, he having died in the year 1860, which was subsequently sold by the sheriff for the non-payment of state and county taxes, under an execution for the same against such agent, the purchaser at such sale acquired a valid title. *Williams, adm'r, vs. Young, adm'r..... 453*

TRESPASS.

1. A ministerial officer is protected in the execution of a process from a court of competent jurisdiction, where there is nothing on the face of the process or attached thereto, showing that it is illegal or void, or that it has been superseded. *Johnson vs. Fox et al..... 270*
2. In an action against an officer for levying and selling under such a process, if the plaintiff rely on the fact that it has been superseded, he should not only so state in the declaration but should also charge notice of that fact on the officer. *Ibid.*
3. Where, on a trial in a justice court of the issue made by counter-affidavits against lien executions in favor of laborers, judgments are rendered for plaintiff, and an appeal is entered or a *certiorari* sued out, the justice has no authority to grant an order that the executions proceed for the purpose of raising money to pay the cost. *Ibid.*
4. But as it does not appear from the record whether the sale in this case was had under an order to proceed with the original execution or under a special order directing a sale, and that the proceeds be applied to the payment of cost, the judgment sustaining the demurrer is affirmed. *Ibid.*

3. On the trial of an action brought by the owner of rice lands against a canal company, for overflowing his lands, by water escaping from the canal on account of the "sides and banks thereof being and continuing in a bad and ruinous condition, for want of needful and necessary repairing and mending the same," the court charged the jury: 1st. That the defendant is responsible for damages caused by the bottom of the canal getting foul or filling up so as to cause the water to rise higher in the canal and to flow through a swamp or reservoir of the defendant's so that plaintiff's drains could not, under the ordinary flow, vent it. 2d. That if the jury found that any damages has resulted to the plaintiff by reason of the omission or commission of any act on the part of the defendant to keep its canal in proper order, the plaintiff is entitled to recover:

Held, that there is no evidence in the record as to the bottom of the canal being foul or filled up to authorize the first point in the charge, and the second is too broad and general for the pleadings. *Savannah and Ogeechee Canal Co. vs. Bourquin*..... 378

6. Damages for a continuing trespass, such as those arising from overflowing one's land, can only be recovered to the time of commencing suit therefor. Subsequent damages for a continuance of the trespass give a new right of action. *Ibid.*
7. The plaintiff in this case was not entitled to have included in the verdict, as part of his damages, the outlay he made for the purpose of planting and cultivating land which he knew was then overflowed. *Ibid.*
8. In an action upon the case against a railroad company, it was charged in the declaration that the defendant had stopped and dammed up a stream of water with an embankment, and caused a pond of water to accumulate and remain, and that thereby the plaintiff's family had been made sick, and he had been put to great expense and loss of time, etc. On the trial it was proposed to amend the declaration, and charge that defendant had thrown up an embankment in altering the locality of its road-bed, and had, in so doing, turned up and exposed to the sun and air earth that had before been unexposed, and had thus produced malaria and caused sickness in the plaintiff's family,

- etc. The judge refused to allow the amendment, and there was a verdict for the defendant, and a motion for a new trial on various grounds. The judge granted the new trial on the ground that he erred in refusing the amendment, but overruled the motion on the other grounds:
- Held*, that the amendment was properly refused. It was a new cause of action, and under section 3480 of the Code an amendment introducing a new cause of action is not allowable. *Central R. R. and Banking Co. vs. Wood*..... 515
9. A licensee who, under a parol license to enjoy an easement of a permanent nature upon the land of another, such as to back water by the erection of a mill dam, expends money and makes investments in pursuance thereof, is not liable to an action of trespass for erecting the dam either by the party giving the license or any subsequent owner of the land which is overflowed; nor is any subsequent owner or possessor of the mill and dam liable to an action for keeping up such dam. *Winham, King & Aldridge vs. McGuire*..... 578
10. The right to such an easement is not forfeited for non-user, unless it be for a period sufficient to raise the presumption of a release or abandonment. *Ibid.*
- ### TRUSTS.
1. A deed was executed in 1861 by an administrator, for land purchased at his sale, reciting that J. B., as trustee for his wife, M. B., was the highest bidder. It then acknowledges the receipt of the purchase money from J. B., trustee for M. B., and conveyed the land to J. B., trustee for M. B., his successors in office and assigns:
- Held*, that the deed having been made by an administrator to the husband and accepted by him, a separate estate in the wife was thereby created, although there were no special words in the deed to that effect. *Brown vs. Kimbrough, adm'r, et al*..... 35
2. Such being the legal effect of the deed, a bill filed by the wife against vendees holding under her husband, with notice of the deed, for the purpose of canceling the conveyances executed to them, and charging that

the land was paid for by her husband out of her separate estate, is not demurrable.

3. Where a marriage settlement was executed, by which a vested remainder interest in the wife was conveyed to trustees for the purpose of protecting it from the marital rights of her husband, and to secure the same for the benefit of herself and children, should she have any, reserving the right to dispose of the same by will or otherwise, during coverture, if she had no children, and in the event of her failure to make any disposition thereof during life, then to go to her heirs-at-law:

Held, that upon the death of the husband, without any children by that marriage, leaving the wife surviving, the trust was executed, and that the widow held the property in the same manner as she did before her marriage. *Rogers, trust., et al., vs. Cunningham, ex'r.*

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4. Upon the second marriage of the widow, said remainder interest, in the absence of a settlement, vested in her husband by virtue of his marital rights. *Ibid.*

5. When the legal title to property is vested in a trustee for infants, who can sue for it, and who fails to do so within the time prescribed by law, so that his right of action is barred, the infant *cestui que trusts*, who have only an equitable interest in the property, will be also barred; but when the legal title is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. *Wingfield, adm'r, et al., vs. Virgin et al.* 139

6. When a trustee invests trust funds in property in his own name, the *cestui que trust* may elect to follow the *corpus*, and as against a judgment creditor of the trustee, the title of the *cestui que trust* has the preference, especially if the debt of the creditor be in existence at the time of the purchase of the property by the trustee with the trust funds. *Gray vs. Perry et al.* 181

VENDOR AND PURCHASER.

1. It is a good plea in defense to a note given for land, that a bond was given by the plaintiff to make a good title to the land on the payment of the price, free from *liens and incumbrances*, and that at the time of the making of the bond certain liens were known to exist;

- that the true title to the land was in several persons, of whom plaintiff was one; that it was the intent of the parties that plaintiff should take up the liens and procure a title from the others before payment of the note; that the liens were still subsisting and the title from the other joint owners still not obtained, and that the defendant had offered and was still willing and ready to pay on compliance with the contract. *Clark vs. Croft*..... 368
2. The claimant's right to be protected as a *bona fide* purchaser against the lien of the plaintiff's judgment, on account of his four years' possession of the property, cannot be defeated by a levy without the notice which the law requires to be given. *Anderson & Co. vs. Chenney*..... 372
3. A plea which sets up that the note sued on was given for a tract of land, for which the plaintiff executed his bond for titles, in the usual form, to the defendant; that the plaintiff had no title to the land and is insolvent; and which offers to deliver up to be canceled the bond, and prays the rescission of the contract aforesaid, is not demurrable. *Sizemore vs. Pinkston*. 398
4. The defendant can obtain the same relief in a court of law, as to the rescission of the contract, as he could in a court of equity, and have the verdict so moulded as to compel the defendant to surrender the possession of the land, and to place the parties in the same condition in which they were before the contract was made. *Ibid.*
5. Where a bill was filed to enjoin the sale of certain land under an execution for the purchase money therefor, upon the ground that no deed conveying the same to the complainant had been filed and recorded in the clerk's office prior to the levy, and the bill was sanctioned, with the privilege to the defendant to file such deed and proceed in the collection of his debt, and an amended bill was presented stating that the defendant had again levied and was proceeding to sell, setting up other grounds for injunction, it will be presumed that the deed has been filed and recorded under the privilege allowed in the first order. *Allen vs. Thornton, adm'r, et al.*,..... 594

6. The mere allegation that the title to the land has failed, in the absence of any charge of insolvency on the part of the defendant, is no ground to enjoin the sale under the execution for the purchase money. The complainant should have set up such defense to the suit on the notes, or look to the covenant in the bond for titles. *Ibid.*
7. When the owner sells land, giving bond for titles and taking notes for the purchase money, which are not paid at maturity, he is not entitled to file a bill to cancel the contract and to recover the land, and in the meantime to have a receiver appointed to take charge of the premises, on the sole ground of the insolvency of the purchaser, it not appearing that the vendee became insolvent after making the contract of purchase. *Jordan, adm'r, vs. Beal, et al.,.....* 602

VENUE. See *Injunction*, 7.

VERDICT.

1. Where the jury pass upon questions not put in issue by the pleadings, their verdict is illegal and will be set aside. *Rhodes vs. Hart.....* 320
2. Where a bill was filed praying an injunction against the enforcement of an execution, and it appeared that the plaintiff in the execution had filed a petition for partition of a parcel of land on which was a mill, the petition alleging that the petitioner and A had owned the land in common and had agreed to run the mill in partnership, but that A had sold his interest to B, and that C had set up certain claims against the partnership; that commissioners had been appointed to investigate the accounts and to sell the land; that the commissioners had reported that they had investigated the accounts of the partnership between the petitioner and A, and found the petitioner *entitled to \$1,000, less \$200*, and that the firm owed C nothing. A, B and C all excepted to the report, and the issue was tried by a jury, who found in favor of petitioner \$800 00. Petitioner's counsel entered up a judgment against A, B and C for the amount, and execution was levied on the property of C, who filed the bill, insisting that the judgment should have been entered against A alone:

Held, that the judge did not err in granting the injunction. Under the pleadings it is impossible to say what was the real intent of the verdict of the jury, and equity and good conscience requires that there should be a rehearing. *Butt vs. Oneal*..... 358

See *Criminal Law*, 1, 7, 8, 18.

WAIVER. See *Contracts*, 8.

WAREHOUSEMEN.

1. Where cotton was stored with the defendants as warehousemen, and the houses containing the same were seized by the military authorities of the Confederate States, to be used as hospitals, and the cotton thrown into the streets, where it was seen by one of the defendants, and the facts show a strong probability that it was also seen by the plaintiff, and the court charged the jury that though the cotton had been thrown out of the defendant's house by the *vis major*, yet if the defendants could, by the exercise of ordinary care, have recaptured and taken care of it, they were liable, and that the measure of damages was the value of the cotton at the time of the demand :

Held, that under the facts this was error. The judge should have qualified this charge by adding, unless the plaintiff knew, or had good reason to believe that his cotton or a portion of it was thrown out by the military authorities, in which case, if he could have saved it by the exercise of ordinary care, the defendants would not be liable, and that the jury, in determining the question of ordinary care, were to take into consideration the situation of the defendants and their ability or want of ability to exercise ordinary care in the matter. *Smith & Oneal vs. Frost* 336

2. If the defendants abandoned the care of the cotton when it was thrown out of their buildings, and were guilty of want of ordinary care in not retaking it, the measure of damages is the value of the cotton at the time of the abandonment and not at the time of the demand. *Ibid.*

WATER.

1. On the trial of an action brought by the owner of rice lands against a canal company, for overflowing his lands, by water escaping from the canal on account of the "sides and banks thereof being and continuing in bad and ruinous condition, for want of needful and necessary repairing and mending the same," the court charged the jury: 1st. That the defendant is responsible for damages caused by the bottom of the canal getting foul or filling up, so as to cause the water to rise higher in the canal and to flow through a swamp or reservoir of the defendant's, so that plaintiff's drains could not, under the ordinary flow, vent it. 2d. That if the jury found that any damages have resulted to the plaintiff by reason of the omission or commission of any act on the part of the defendant to keep its canal in proper order, the plaintiff is entitled to recover:
Held, that there is no evidence in the record as to the bottom of the canal being foul or filled up to authorize the first point in the charge, and the second is too broad and general for the pleadings. *Savannah and Ogeechee Canal Co. vs. Bourquin*..... 378
2. The fact that a canal company has used for upwards of twenty years a break or opening in the bank of the canal where it runs through a swamp or pond, for the purpose of supplying the canal with water from the swamp as a reserve, and that there has also been during that period, at certain times, an outflow of water from the canal through the break, does not constitute such a prescriptive right in the company as to entitle it to increase intentionally, or by negligence, such outflow, so that it will cause the water to escape from the swamp and submerge the land of an adjacent proprietor. *Ibid.*
3. To entitle different possessions to be tacked so as to make out the time required to establish a title by prescription to land, it is necessary to show that they are successive possessions. But this rule does not apply to the case of a claim to an easement on the land of another, arising out of the facts recited in the ensuing head-note of this syllabus. *Winham, King & Aldridge vs. McGuire*..... 578

4. A licensee who, under a parol license to enjoy an easement of a permanent nature upon the land of another, such as to back water by the erection of a mill dam, expends money and makes investments in pursuance thereof, is not liable to an action of trespass for erecting the dam either by the party giving the license or any subsequent owner of the land which is overflowed; nor is any subsequent owner or possessor of the mill and dam liable to an action for keeping up such dam. *Ibid.*
5. The right to such an easement is not forfeited for non-user, unless it be for a period sufficient to raise the presumption of a release or abandonment. *Ibid.*

WILLS.

1. A witness may give his opinion of the sanity of a testator, if he state the facts on which that opinion is founded. *Dennis et ux vs. Weekes*..... 24
2. Under this rule, the opinion of the witness Peek, as to the condition of testator's mind when he last saw him, was admissible, for he gives the facts on which he rests that opinion. The same may be said of the opinion expressed by caveatrix in her testimony. *Ibid.*
3. But this does not entitle the witness to give an opinion "that testator was in a condition to be easily influenced," or "that he seemed to be under the influence of W. altogether," or to state, "he cannot say what the full influence of W. was, although he (the testator) seemed to be obedient to the commands of W." The witness should give the facts on which these statements were based. *Ibid.*
4. The remark made by caveatrix in her testimony: "I did not know that W. was the first, and probably by far the largest legatee in the will," was not admissible to prove that W. was such a legatee, but it was competent for her to give it as a reason, and for what it was worth, as such, why she had changed her purpose, as indicated by former declarations of hers, not to contest the will. *Ibid.*
5. On the trial of an issue of *devisavit vel non*, the admission of an executor before qualification is admissible to impeach the will, when such admission is in

- reference to the conduct or acts of the executor as to some matter relevant to the issue. *Ibid.*
6. Parol evidence of the declarations of a testator, expressing dissatisfaction with his will, and made shortly after its execution, such as "I have done something I ought not have done; I have made my will, and did not make it as I wanted to; I know I did wrong, but I could not help it. Lord God Almighty, who ever heard of such a will, but I can't change it," is admissible, not to prove the fact that fraud was practiced upon him, or that undue influence was actually exercised, but as tending to show the state of testator's mind, and that he was in a condition to be easily influenced. *Ibid.*
7. An instrument which has all the formalities of a deed, except the following words in the concluding part of it: "This deed is not to go into effect until after the death of said B. Bright, (the grantor,) he being very ill," under the 2395th section of the Code, is a testamentary paper. *Bright et al. vs. Adams et al.* 239
8. Samuel Strong died testate in 1828. By the fourth item of his will, executed in that year, he gave to his wife, Ann Strong, certain slaves and a tract of land, and divers other articles of personal property—"forever to do with as she pleases in fee simple." By the fifth item he gave to his minor son, William, and to his heirs forever, certain slaves, and also the plantation whereon testator resided. The seventh item is as follows: "I lend to my beloved wife, Ann Strong, as long as she remains a widow, or during her natural life, nine negroes, to-wit; Darby, Mariah, Rachel, Isaac, Nancy, Frank, Knob, Jacob and Burton. Also, the use of my land and plantation whereon I now live, together with all my stock of every kind; my household and kitchen furniture, and everything on or belonging to my house or plantation, and it is my desire and will that my beloved wife keep peaceable and quiet possession of my house and plantation as it now is, keeping all together; and if my beloved wife should not marry, but remain single until my son, William Strong, comes of age, then I wish all the property I have lent to my wife, to be equally divided between my said wife and my said son William, and for my

said wife to hold her part until she either marries or dies, and at her marriage or death, which happens first, then the part I have left her I give to my son William and his heirs forever; and if my said son William should die without a lawful begotten heir of his body, then I give all the negroes I have given him, to-wit: Winny, Nancy, Buck, Harry, Shibo and Gilbert, and one-half of the tract of land whereon I now live to the agent of the Colonization Society wherever he may be, in trust for the Colonization Society, for them to send the said negroes with their increase, to Liberia, Africa, that they may be free, and the money arising from the sale of the land to bear their expenses and support them one year when there. My will is for my wife, Ann Strong, to hold the other half of my land, with the house and houses, stock of all kind, furniture and all things and articles thereunto belonging during her life, and at her death for all the negroes that I lent her, I give in trust to the above named agent of the above named Colonization Society, for them to send such said negroes to Africa to be free, and the other half of this land to bear their expenses and support when there." The negroes mentioned in this item as being loaned to Mrs. Strong, are not those given her absolutely in the fourth item. Ann Strong, the widow, married in 1830, William then being a minor. William, after the marriage of his mother, went into possession of the land mentioned in the fifth and seventh items, and continued in possession until 1867, when he died, and, as alleged, "without a lawful heir of his body begotten :"

Held, that at the marriage of Mrs. Ann Strong, William took an absolute estate in the land mentioned in the fifth and seventh items. *Strong et al. vs. Middlelon...* 462

9. Where a testator stated in his will that he held certain notes on a legatee which he was to pay into his estate, and after the death of said testator, the legatee, who had become the executor of said will, produced a receipt for a large sum of money signed by the testator, stating that the amount therein mentioned was to be credited on the notes held by him, it was error for the court, on the trial of a bill for account filed against said executor by the other legatees, to charge the jury that if they should find the notes extinguished by the

- receipt, that the said executor should account for the same as an advancement. The question was whether said notes were extinguished during the life of the testator? If they were not, they could pass under the will; otherwise, they could not. The question of advancement was not involved. *Thrasher, ex'r, vs. Anderson et al.*..... 542

WITNESS.

1. On the trial of an issue arising upon a contract entered into between A of the one part, and B, C, D, E and F of the other part, all the parties being present and engaged in fixing the terms, A is not an incompetent witness because one of the parties of the other part has since died. *North Georgia Mining Company vs. Latimer*..... 47
2. Where clients authorize their attorney at law to make a certain contract with a party, which is done, and the contract is carried out according to the agreement, such authority, thus given, is not a confidential communication by the clients, and the attorney is a competent witness to prove the contract. *Burnside vs. Terry et al.*..... 186
3. Whether the witness who was rejected by the court was or was not competent, is an immaterial question in this case, as it does not appear from the record that his testimony could have been of any benefit to the party offering him. *Lee vs. Clark, ex'r*..... 279
4. It is not error in the court, on the trial of a criminal case, to require the witnesses of both the state and the prisoner to be sworn, and to leave the court-room before commencing the examination of any of the witnesses. *Meeks vs. The State*..... 429
5. A party to a cause of action on trial is a competent witness to identify a book of accounts sought to be introduced in evidence by him as his book of original entries, even though the opposite party be dead. *Strickland et al., adm'r's, vs. Wynn*..... 600.
6. Where an action was brought by the widow and children of the assured on the following receipt:

"Received of James R. Scurry \$375 00, same being in payment of insurance in the Cotton States Insurance Company; this receipt being binding on said Company until policy is received.

J. S. RAINES,

"*Agent of C. S. Life Ins. Co., of Macon, Ga.*

"Baker county, Georgia, September 6, 1871."

And Raines, the agent, signing said receipt, was offered by the defendant as a witness:

Held, that he was competent, not being a party to the original contract with James R. Scurry, nor interested therein. *Scurry et al. vs. Cotton States Life Ins. Co...* 624



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